In the Supreme Court of the United States

OCTOBER TERM, 1924

C. G. LEWELLYN, FORMERLY COLLECTOR OF United States Internal Revenue for the Twenty-third District of Pennsylvania, plaintiff in error *v.* ADELAIDE H. C. FRICK, HELEN C. FRICK, Childs Frick, Henry C. McEldowney, and William Watson Smith, Executors of the Last Will of Henry C. Frick	No. 681

BRIEF IN REPLY TO "BRIEF FOR DEFENDANTS IN ERROR"

I

Counsel for defendants in error and the court below have a wrong conception as to what is taxed

The argument by counsel for the defendants in error proceeds on the theory that the statute *taxes* the *transfer* of insurance *policies.* This is apparent from consideration of page eighteen of the brief for the defendants in error, where reference is made to a "paid-up policy." The statute by its expressed words does *not* tax the transfer of

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policies. Furthermore, neither the policies nor their value are included in the gross estate. Their transfer, issuance, or assignments are entirely immaterial. What is included is the " amount receivable "—the money. Regardless of who owned the policies at the date of Mr. Frick's death, the moneys received were in substance the decedent's money, for it was the decedent's money that purchased the right to receive them, and that right was contingent upon the decedent's death. The amounts thus received were included under the statute, whether received by the beneficiaries or by the estate, the only difference being that when received by beneficiaries a part is exempt. The correct theory is that the decedent makes a gift, not of the policy but of his money (invested in insurance, it is true), and the gift is not complete until the money is received.

The court below says in its opinion (R. p. 36):

> Here, the statute arbitrarily makes something a part of the Frick estate which in fact was no part of it, and upon the value of that undertakes to levy an estate tax, an ad valorem transfer excise tax, amounting to 25 per cent of the value.

The court was in error in three respects:

1. For the purpose of measuring or levying a tax upon the transfer of the net estate, the moneys received by Mrs. and Miss Frick were a part of the Frick estate. They were accumulated or purchased by Henry C. Frick in his lifetime. The right to

their possession and enjoyment was generated *by his death* precisely the same as the right to the possession and enjoyment of a trust estate created by a testator to take effect upon his death is so generated. His death, though unavoidable, was just as essential to the possession and enjoyment of these funds as was the purchase of insurance for Mrs. and Miss Frick, or its assignment to them. After, and *because of, Mr. Frick's death* they *received* those moneys. One can not *receive* money or property unless another part with it. A *receipt* is a part of a *transfer. These moneys were in fact transferred after and because of Mr. Frick's death from the insurers—the insurance companies—to his wife and daughter.* If no funds could be included in the net estate for the purpose of measuring the tax other than funds actually transferred (which is not true, as shown in the Government's original brief), *such transfer actually occurred here.* The statute does not say *when* the transfer shall occur, or *from and to whom the moneys or property shall pass.* It certainly does not contemplate that it shall pass *from the decedent at the moment of and because of his death.* True, the transfer mentioned is that of the estate of decedent, *but the decedent's estate is that which is made up of the elements expressly designated in the statute.* In *Knowlton* v. *Moore,* 178 U. S. 41, 57, the Court says: " Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or *receipt*

of property by death which is the subject levied upon by all death duties." This contention is alternative to that discussed at length in the Government's original brief, that these moneys can properly be included in the estate for the purpose of *measuring* the tax even if there were no such technical transfer of them as to create the occasion for the tax specified in the statute.

2. It is incorrect to say "upon the value of that" (the something made a part of the Frick estate) the statute "undertakes to levy an estate tax." In mentioning " the value " the court manifestly had in mind the policies, but, as above shown, the tax is levied on neither the policies nor their value, nor the moneys received under the insurance contracts. It is levied " upon the transfer of the net estate," and the generating cause—the cause which justifies the tax and to which it is attached—is the death of the decedent.

3. In measuring the tax, twenty-five per cent of the value of the amount received by Mrs. and Miss Frick, less the $40,000 deducted under the statute, was not taken. The moneys received by them were not the last money added to the estate. All classes of property, all kinds of funds mentioned, are pooled together. Neither the executors have a right to complain that these funds derived from the insurance increased the rate of taxation, nor would Mrs. and Miss Frick have a right to complain that the other funds belonging to the estate increased the amount which they might be required

to pay, if the will did not relieve them from the payment of this tax. While section 408 is not here before the Court for construction, as the entire tax is payable by the executors, and while the validity of the tax does not depend upon the validity of that section, yet no more just general provision for the payment of the tax can be devised than that provided in that section. If the *levy* and *measurement* of the tax is legal, it certainly can not be made illegal by requiring those to pay it who reap the benefits from the investments made, or insurance bought, by the decedent.

II

The provision of the act of 1918 (40 Stat., chap. 18, sec. 402 (f), p. 1098) applies to the proceeds of policies issued before the passage of the act

The argument is advanced also that the section (402 f) of the Revenue Act of 1918 involved in the instant case should not be construed retroactively so as to compel the inclusion in this decedent's gross estate of these policies (or, inferentially, the amounts received after the decedent's death) which were taken out prior to the passage of the Act.

In *Shwab* v. *Doyle* (258 U. S. 529) there was included in the gross estate the value of a trust created prior to the passage of the Revenue Act of 1916, in contemplation of death. The equitable interest vested at once in the beneficiaries and the founder reserved no interest in the fund. In *Union Trust Company* v. *Wardell* (258 U. S. 537)

there was included in the gross estate the value of a trust created prior to the passage of the same Act, intended to take effect in possession or enjoyment at or after death. The equitable interests vested at once and consisted of a life interest in the founder with an equitable remainder over on her death. In *Levy* v. *Wardell* (258 U. S. 542) there was included in the gross estate the value of a transfer made prior to the passage of the same act, and intended to take effect in possession or enjoyment at or after death. The estate vested at once and consisted of a life estate reserved to the transferor and a vested remainder over. The Court held that "*the text of the act of Congress*" *was not to be construed to apply to "transactions completed when the act became a law.*" *Shwab* v. *Doyle, supra.* That conclusion was said, in the *Union Trust Company case*, to be fortified by the fact that, if retroactively construed, "*the act is given operation against an instrument executed fifteen years before the passage of the act.*"

The "text of the act of Congress," considered in those cases, made the propriety of the inclusion in the gross estate depend upon an act, namely, a transfer made or trust created, and in those cases the determinative acts occurred before the statute was passed. The trusts had been created and the gift had been made at the time the act took effect. The transactions mentioned in the act had been completed and the instruments evidencing and constituting those transactions had been executed.

But the "text of the act of Congress" to be considered in the instant case makes the propriety of the inclusion in the gross estate depend upon the receipt of the proceeds of life insurance taken out by the decedent. The act which, by the text of the statute, is controlling is *the receipt*, and this act occurred after the passage of the statute. The transaction was not completed until death. The act applies in this case, not because the policies were taken out, but because the proceeds were received. Manifestly, the time when the policy is "taken out" is immaterial, for it could not be contended that a policy taken out many years before the passage of the act and assigned thereafter to a beneficiary was not within the act.

This distinction is emphasized by the decision in the case of *Knox* v. *McElligott* (258 U. S. 546). In that case the Court held that the one-half interest of the survivor of a joint tenancy created before the act was not to be included in the gross estate of a decedent dying after the passage of the act; but the other one-half interest which was "received" by the survivor was included. The rationale of these decisions is that where the statute refers to the *creation* of the rights as fixing the liabilities, those rights must be created after the passage of the act, but when it refers to the *fruition* of those rights, it is only necessary that the fruition takes place after the passage of the act.

It is to be noted also that in making express provision for the retroactivity of the Revenue Act

of 1924, in section 302(h), Congress provided that the act should apply to " the transfer, trusts, estates, interests, rights, powers, and relinquishment of powers " enumerated and described in subdivisions b, c, d, e, f, and g "whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act," but did not deem it necessary to refer to the " taking out of policies." It did not say that the act should apply to insurance monies receivable upon policies taken out " before or after its passage." Consequently this section, 302(h), can not be said to show an intention of Congress to change the construction of the former law. Manifestly, it was not necessary to make any change, for the previous and present intent is the same, namely, to make the inclusion depend, not only the taking out of a policy, but upon the receipt of the proceeds.

It certainly can not be insisted with reason that the proceeds of policies issued before the enactment of the statute and *made payable to the executors* were not intended to be included in the gross estate. That being true, the date of the issuance of the policy is immaterial; the determinative event is when the money is received. The requirements that there shall be included in the gross estate the amounts received by the executors as insurance and those received as insurance " by all other beneficiaries " in excess of $40,000, *are in the same sentence, and there is not a word in the provision which contains a suggestion that a different rule was in-*

tended to be observed as to the two classes of funds derived from insurance. In fact, if the provision does not apply to insurance policies issued before the passage of the act, it could have had but little practical effect for a number of years after its passage. Such a construction would practically postpone for years its going into effect. Policies are issued only to those who are physically fit and have a long expectancy of life, and but few policies mature within the early years after their issuance.

The incidental inclusion of clause (g) among those made especially retroactive in the Revenue Act of 1924 (sec. 302 (h), 42 Stat. 305) is no indication that Congress understood that the insurance provision in the act of 1918 did not apply to policies issued before the passage of the act.

There are two lines of cases relating to the modification of the language of legislative acts by subsequent legislation. The one line proceeds upon the theory that Congress intended to include a *casus omissus* from the previous act, and the other upon the theory that Congress intended to remove any doubt that might otherwise exist as to the inclusion of the case in the previous act.

Apparently the distinction between the two lines of decisions is this: If the inserted words change the meaning of the language of the previous statute, or add something thereto when construed *according to the obvious and usual meaning of its language,* it will then be assumed that the inserted words were intended as an amendment; but if the

words inserted accord with the plain and obvious meaning of the language of the previous statute, they are taken to define and make more certain its meaning.

The following cases are cited in support of the Government's contention:

In *Bailey* v. *Clark* (21 Wall. 284, 288) the question was whether a statute imposing a tax upon the "capital" of bankers (14 Stat. 136) included loans. It was held that it did not, and that a later statute expressly so providing (17 Stat. 256) "was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning."

In *Johnson* v. *Southern Pacific Company* (196 U. S. 1, 21) the question was whether the words "any car," in a statute providing that cars engaged in interstate commerce should be equipped with automatic couplers, applied to locomotives. It was held that it did, and that the result was not affected by an explicit provision to that effect in a later law (32 Stat. 943). Of the later act it was said: "This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

In *Wetmore* v. *Markoe* (196 U. S. 68, 77) it was held that a liability for past-due installments of alimony was not a "debt" which might be discharged under Section 63 of the Bankruptcy Act of 1898, and that this result was not affected by a subse-

quent act expressly excepting alimony due or to become due from the operation of a discharge in bankruptcy. Of the later act it was said that it was "merely declaratory of the true meaning and sense of the statute."

In *United States* v. *Coulby* (251 Fed. 982, 985) it was held that the Income Tax Law of 1913 did not require a member of a partnership to include as net income subject to tax moneys received by his firm as dividends on the stocks of corporations subject to income tax. An explicit provision to this effect was inserted in the Income Tax Act of September 8, 1916 (29 Stat. 756); but the court said that "this provision was inserted in the 1916 act to put at rest the present controversy, rather than to change the law."

An illustration of this principle may be found in certain of the inheritance tax decisions. In *Matter of Reynolds' Estate* (169 Cal. 600; 147 Pac. Rep. 268) the court had under consideration a statute amending the provision taxing transfers made "in contemplation of death" by giving a special definition of that term, so that it was to "be taken to include that expectancy of death which actuates the mind of a person on the execution of his will," and was not to be "restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*." The court said that this amendment "served the purpose of elucidating without changing the law, by giving fuller ex-

pression to the legislative intent and meaning." A later decision to the same effect is *Abstract & Title Guaranty Company* v. *State* (173 Cal. 691).

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APRIL, 1925.

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NO. 681.

C. G. LEWELLYN, Formerly Collector of United States Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error,

vs.

ADELAIDE H. C. FRICK, HELEN C. FRICK, CHILDS FRICK, HENRY C. McELDOWNEY and WILLIAM WATSON SMITH, Executors of the Last Will of Henry C. Frick.

In Error to the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR DEFENDANTS IN ERROR.

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TABLE OF AUTHORITIES.

Statutes Printed in Appendix.

	Page
Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057:	
Section 401, *Id.* 1096	1 a
Section 402, *Id.* 1097	3 a
Section 403, *Id.* 1098	5 a
Section 408, *Id.* 1100	9 a
Life Insurance Exemption Laws	
Connecticut	27 a
Massachusetts	28 a
New Jersey	29 a
New York	29 a
Pennsylvania	31 a

Other Authorities

Regulations 37, Article 32	35 a
Coke Upon Littleton, 214-b	36 a
Dickinson J.'s opinion in *Girard Trust Company vs. McCaughn*	72 a
Brewster J.'s opinion in *Coolidge vs. Nichols*	83 a

Cases.

(Reference to pages of the appendix to this brief are numbered 1 a, 2 a, etc.)

Addy Co. vs. United States, 264 U. S., 239	45 a
Air-Way Corporation vs. Day, 266 U. S., 71	59
Anderson's Estate, 85 Pa., 202	24
Allis, Will of., 174 Wis., 527	71 a
Bennett vs. Robinson, 10 Watts, 348	29
Benziger vs. United States, 192 U. S., 38	43 a
Billings vs. United States, 232 U. S., 361	71 a
Black vs. State, 113 Wis., 205	78
Brown vs. United States, 298 Fed., 177	44 a
Brushaber vs. Union Pacific R. R. Co., 240 U. S., 1	51, 69 a, 70 a, 85
Bullen vs. Wisconsin, 240 U. S., 625	67 a

PAGE

Carnegie, Andrew, Matter of, 203 App. Div., 91....24, 28
Carroll vs. Greenwich Insurance Co., 199 U. S., 401 48 a
Carbon Steel Co. vs. Lewellyn, 251 U. S., 501........... 70 a
Carstairs vs. Cochran, 193 U. S., 10........................ 66
Chanler vs. Kelsey, 205 U. S., 466........................ 59
Child Labor Tax Case, 259 U. S., 20........................ 52
Choate vs. Trapp, 224 U. S., 655........................ 47 a
Colorado vs. Harbeck, 232 N. Y., 71........................ 66
Commonwealth vs. Wellford, 114 Va., 372, 76 S. E. 917 .... 50 a
Coolidge vs. Nichols, Collector (not reported)....51 a, 83 a
Cooper vs. Pogue, 92 Pa., 254........................ 29
Dawson vs. Kentucky Distilleries Co., 255 U. S., 288 .... 50, 60 a
Delaware, Lackawanna & Western R. R. Co. vs. Penn'a., 198 U. S., 341........................ 59
Dolan's Estate, 279 Pa., 582........................28, 30
Douglas vs. Edwards, 298 Fed., 229........................ 40 a
Edwards vs. Slocum, 264 U. S., 61........................ 57
Eidman vs. Martinez, 184 U. S., 578........................42 a, 44
Eisner vs. Macomber, 252 U. S., 189........................ 50, 61 a
Elliott's Appeal, 50 Pa., 75........................ 24
Empire Fuel Co. vs. Hays, 295 Fed., 704........................ 44 a
Flint vs. Stone Tracy Co., 220 U. S., 107........................ ....49, 58 a, 66 a, 80, 87
Girard Trust Co. vs. McCaughn (not reported)....30, 72 a
Gould vs. Gould, 245 U. S., 151........................42a, 44
Greiner vs. Lewellyn, 258 U. S., 384........................ 67 a
Hartman vs. Greenhow, 102 U. S., 672........................64, 73
Hill vs. Wallace, 259 U. S., 44........................ 52
Holden vs. Insurance Co., 77 So. Carolina, 299........ 24
Hooper vs. California, 155 U. S., 684........................ 45 a
Howat vs. Kansas, 258 U. S., 181........................ 45 a
Hunt vs. Wicht, 174 Calif., 205, 162 Pac., 639........... 49 a
Hylton vs. United States, 3 Dall., 171........................70 a, 87
Irvine vs. Sibbetts, 26 Pa., 477........................ 29
Irwin vs. Gavit, 295 Fed., 84........................ 39 a
Jones vs. Clifton, 101 U. S., 225........................ 28
Keeney vs. New York, 222 U. S., 525........................ 69 a
Kissam vs. McElligott, 280 Fed., 212........................ 40
Knights Templars' Indemnity Co. vs. Jarman, 187 U. S., 197........................ 45 a

PAGE
Knowlton vs. Moore, 178 U. S., 41 .... 57, 58, 62, 76, 87
Knox vs. McElligott, 258 U. S., 546 .... 35, 40, 41, 46
Lacey vs. State Treasurer, 152 Iowa, 477 .... 50 a
Levy vs. Wardell, 258 U. S., 542 .... 35, 38, 41
Lloyd vs. Royal Union Mutual Life Ins. Co., 245 Fed., 162 24
Loan Association vs. Topeka, 87 U. S., 655 63
Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S., 467 .... 39 a
Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283 .... 68 a
Maxwell vs. Bugbee, 250 U. S., 525 .... 56 a
Miller—Matter of, 236 N. Y., 290 .... 28, 30
Monroe Cider Vinegar & Fruit Co. vs. Riordan, 280 Fed., 624 .... 40 a
McArthur vs. Scott, 113 U. S., 340 29
McCray vs. United States, 195 U. S., 27 .... 46 a, 69 a
Neary vs. Metropolitan Life Ins. Co., 103 Atl. Rep., 661 24
New York Trust Co. vs. Eisner, 256 U. S., 345 49
Nicol vs. Ames, 173 U. S., 509 .... 50, 63 a, 64 a, 65 a, 69
Orr vs. Gilman, 183 U. 278 .... 67 a
Panama Railroad Co. vs. Johnson, 264 U. S., 375 .... 45, 46 a
Parson's Estate—Matter of, 102 N. Y. Supp., 168 24
Patton vs. Brady, 184 U. S., 608 .... 49, 59 a, 70 a
Pell, In Re, 171 N. Y., 48 .... 48 a, 50, 52, 63 a
Plant vs. Walsh, 280 Fed., 722 .... 44 a
Pollock vs. Farmers Loan & Trust Co., 157 U. S., 429 .... 47 a, 50, 53, 60 a, 63 a, 83, 85, 87, 89
Pollock vs. Farmers Loan & Trust Co., 158 U. S., 601 .... 62 a, 80, 81
Presser vs. Illinois, 116 U. S., 252 .... 45 a
Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S., 18 58
Railroad Co. vs. Collector, 100 U. S., 595 .... 70 a
Rawson vs. Milwaukee Mutual Life Ins. Co., 115 Wis., 641 .... 71 a
Reynolds vs. McArthur, 2 Pet., 417 44
Scholey vs. Rew, 23 Wall., 331 .... 68 a
Shwab vs. Doyle, 258 U. S., 529 .... 35, 37, 37 a, 38, 41, 43, 44, 46

PAGE

Singer vs. United States, 15 Wall., 111 .... 49, 59 a
Smietanka vs. First Trust & Savings Bank, 257 U. S., 602 .... 38 a, 43
Southern Pacific Railroad Co. vs. Kentucky, 222 U. S., 63 59
Springer vs. United States, 102 U. S., 586 87
State of Ohio vs. Ferris, 53 Oh. St., 314 78
State vs. Probate Court, 102 Minn., 268 .... 50 a
Stockdale vs. Insurance Co., 20 Wall., 323 .... 70 a
Thomas vs. United States, 192 U. S., 363 .... 49, 58 a, 64 a, 65 a, 87
Thompson vs. Kreutzer, 112 Miss., 165 .... 61 a
Thompson vs. McLeod, 112 Miss., 383 .... 61 a
Towne vs. Eisner, 245 U. S., 418 86
Towne vs. McElligott, 274 Fed., 960 .... 48 a
Treat vs. White, 181 U. S., 264 .... 64 a, 65 a
Tyler, Administratrix, vs. Treasurer and Receiver General, 226 Mass., 306 20
Union Trust Co. vs. Wardell, 258 U. S., 537 .... 35, 38, 41
Union Refrigerator Transit Co. vs. Kentucky, 199 U. S., 194 .... 59, 62
United States vs. Baltimore & Ohio R. R. Co., 84 U. S., 322 .... 62, 67
United States vs. Field, 255 U. S., 257 .... 39a, 43
United States vs. Coulby, 258 Fed., 27 .... 44 a
United States vs. Delaware & Hudson Co., 213 U. S., 366 .... 45 a
United States vs. Isham, 17 Wall., 496 .... 43 a
United States vs. Merriam, 263 U. S., 179 .... 41 a, 44
United States vs. Perkins, 163 U. S., 625 .... 67 a
United States vs. Singer, 15 Wall., 111 .... 54, 69 a, 79
United States vs. Woodruff, 175 Fed., 776 .... 41 a
Veazie Bank vs. Fenno, 8 Wall., 533 .... 83, 87
Voorhees' Estate—In Re., 193 N. Y. Supp., 168 24
Wallace vs. Hines, 253 U. S., 66 59
Wardell vs. Blum, 276 Fed., 226 59
Washington Central Bank vs. Hume, 128 U. S., 195 25
Washington Water Power Co. vs. United States, 50 Ct. Cls., 76 .... 70 a
Wright vs. Blakeslee, 101 U. S., 174 .... 68 a
Y. M. C. A. vs. Davis, 264 U. S., 47 57

BRIEF FOR DEFENDANTS IN ERROR.

This case in the court below is reported as *Frick vs. Lewellyn*, 298 Fed. 803.

NOTE.—For the convenience of the Court we have printed in an appendix, bound under separate cover, the parts of the statutes and some of the documents involved in the case and also a more extended citation and discussion of authorities on some of the points than we could have included in the main brief without unduly extending its length. To facilitate reference the pages of the appendix are numbered 1 a, 2 a, 3 a, etc.

SUMMARY

STATEMENT OF HOW THE TAX WAS ASSESSED.

A. Explanation of the levy, page 4.

B. Discussion of the statute under which the tax was levied, page 6.

C. Description of the insurance policies upon the proceeds of which the tax was levied and paid, page 15.

POINTS DISCUSSED.

POINT I. The policies of insurance which were taxed in this case were property which belonged, not to Mr. Frick's estate, but to the beneficiaries.

This point is discussed at page 17.

POINT II. The assessment of this tax under the provisions of Section 402 (f) of the Revenue Act of 1918 was illegal because that section of the Act is not retroactive.

This point is discussed at page 33.

POINT III. Even should it be deemed that the Act was intended by Congress to be retroactive, the tax was illegally levied (a) because such a tax is in fact a direct tax, and (b) because it is not due process of law for Congress to levy a retroactive tax on these insurance policies.

This point is discussed at page 47.

POINT IV. It was not due process of law to levy and compel the executors to pay an estate transfer tax on property which was not part of the decedent's estate, but which belonged to Mrs. Frick and Miss Frick.

Such a tax is unconstitutional because—

(1) It is unequal; it is a deprivation of property without due process of law.

(2) The remedy over sought to be given to the executors against the beneficiaries is inadequate,

(a) Because a mere cause of action to recover is not equivalent to immunity from taxation; and

(b) Because the act attempts to give the right to recover only a part of the amount which the estate has to pay.

This point is discussed at page 55.

POINT V. Congress clearly intended that the major portion of this tax should ultimately be imposed upon the beneficiaries of the policies. Such imposition is illegal.

This resolves itself into two principal propositions:

(1) That if the tax can be regarded as an excise tax, it is illegal because the classification is bad; and

(2) That it is not an excise tax at all, but is a direct tax, and is bad because not apportioned.

This point is discussed at page 74.

POINT VI. Reply to brief of plaintiff in error.

This point is discussed at page 90.

CONCLUSION.

Statement of How the Tax Was Assessed.

A. explanation of the levy

The tax which the court below held to be illegal was an estate tax amounting to $108,657.38, which was a portion of the total estate tax, amounting to $6,338,898.68, levied upon the estate of Henry C. Frick before this case was tried in the District Court.

Inasmuch as the argument requires a discussion of the proportions of the tax that will ultimately have to be borne by the different parties, it is, perhaps, not improper to state, though it does not appear in the record, that the Department of Internal Revenue has made four additional assessments of estate tax in this case aggregating $1,137,198.92, since this suit was brought. Consequently, at the present time the total tax collected from the executors amounts to $7,476,097.60, and the proportions that will ultimately have to be borne by the estate and by the beneficiaries will be different from those stated in the brief, which are based on $6,338,898.68, the amount of tax originally levied, as stated in the record. See appendix to this brief, page 52 a.

At the time of Mr. Frick's death his wife and daughter held insurance policies upon his life,

according to the terms of which they were paid $474,629.52. For the purpose of making the levy the amount of these policies, less the statutory deduction of $40,000, that is, $434,629.52, was added to the net value of Mr. Frick's estate; and, as the value of his estate exceeded $10,000,000, the tax levied upon the amount of the insurance was levied at the maximum rate, that is, at 25 per cent., and amounted to $108,657.38.

We desire to emphasize in connection with this point that this particular tax levy was exacted from the executors as an excise transfer tax upon Mr. Frick's estate. It should be borne in mind, as is developed later in a discussion of the language of the Act, that the tax imposed by the statute is an ad valorem tax, graduated at certain percentages of the value of the net estate of a decedent. The particular tax levied in this case was arrived at by first ascertaining the value at the time of Mr. Frick's death of all property, real or personal, tangible or intangible, wherever situated, to the extent of the interest of Mr. Frick at the time of his death which, after his death, was subject to the payment of the charges against his estate and the expenses of its administration and was subject to distribution as part of his estate *plus* certain other things, among which was the excess over $40,000 of the amount of life in-

surance receivable by other beneficiaries than the executors under policies taken out by the decedent. The principal question before this Court is not whether Mrs. Frick and Miss Frick, the beneficiaries under these policies, might not have been lawfully subjected to some other tax, but whether they or the executors can lawfully be required to pay this particular tax levied.

B. DISCUSSION OF THE STATUTE.

This tax was levied and paid under the provisions of Title IV of the Revenue Act of 1918 (40 Stat., p. 1096), which went into effect February 25, 1919. Under the provisions of this Act (assuming its validity), $96,234.10 of the total tax of $108,657.38 is the portion of the tax which should finally be borne by the beneficiaries of the policies, and $12,423.38 is the portion of the tax which should be borne by Mr. Frick's estate; but under the provisions of the Act, as construed and enforced by the Department of Internal Revenue, the entire tax was assessed against the executors and has been paid by them. This assessment the court below held to be illegal.

At this point it is necessary that we should have a clear understanding of the provisions of the statute. Mr. Frick died on the 2nd day of December, 1919. The Revenue Act of 1918 be-

came effective on the 25th day of February, 1919, so that it is that Act to which we must turn to ascertain what justification there was for levying this tax and to ascertain what Congress intended.

Passing for the moment the very apparent fact that Congress did not intend to tax any policies which were in existence prior to the passage of the statute (in other words, to make the statute retroactive), let us see what the provisions of the statute are which relate to the taxation of insurance policies.

Section 401, which imposes the tax, provides "That a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act." Then follows a schedule of percentages, which begins with 1 per centum of the amount of the net estate in excess of $50,000 and increases gradually to the maximum of 25 per centum of the amount by which the net estate exceeds $10,000,000. The whole of this section is printed in the appendix to this brief, at page 1 a. It will be noted that the tax is a graduated tax imposed upon the amount of the net estate of the decedent.

Having thus imposed the tax upon the *net* estate, Congress proceeded to legislate as to how the *gross* estate should be determined, in Section 402, by saying: "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—" (Note the curious language of this section. It does not say his property or property of which he died seized, but *all property wherever situated*)

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, etc.;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust in contemplation of death, etc.;

(d) To the extent of the interest held jointly or as tenants by the entirety by the decedent and any other person, etc.;

(e) To the extent of any property passing under a general power of appointment exercised

by the decedent either by will or by deed executed in contemplation of death;

(f) "To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; *and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.*"—(Italics ours).

This section is printed at length in the appendix to this brief, at page 3 a.

Section 403 prescribes the method of ascertaining the value of the net estate. It provides for certain deductions from the value of the gross estate. This section is printed at length in the appendix to this brief, at page 5 a.

Section 408 takes up again (in a rather unexpected place) the question of the tax upon insurance policies. The first part of the section relates to the collection of taxes which have not been paid within a prescribed time, and provides for appropriate proceedings to be taken by the collector for subjecting the property of the decedent to judgment and sale. The section then goes on to provide that if an undue proportion of the tax has been collected from one of the legatees or distributees by a sale of his property,

he is entitled to contribution from the others. The section then adds to this provision the following declaration: "It being the purpose and intent of this title that, so far as is practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution." The next sentence was not in the law as it existed prior to the insertion of subdivision (f) in Section 402, which imposes the tax upon the proceeds of insurance policies receivable by a beneficiary other than the executor. The language is, "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio." This section is quoted at length in the appendix to this brief at page 9 a.

It may, perhaps, be doubted, whether the draftsman of this section knew what he was doing when he wrote it. What he did do was not to enable the executors to recover the *whole* tax paid by reason of these policies, but only *such*

portion of the total tax paid by the estate as the proceeds of the policies in excess of $40,000 bear to the net estate. The result of this in the present case is that, while the executors paid $108,657.38, they are, under the construction ordinarily placed on this provision, authorized to recover only a fractional part of that amount, to wit, $96,234.10, from the beneficiaries, leaving the sum of $12,423.38 to be borne by the estate. It will be noted that this section might just as well be construed as providing for as many exemptions of $40,000 as there are separate beneficiaries holding insurance policies. This would, of course, increase the burden placed upon the estate. As far, however, as the legal proposition discussed in this brief is concerned, this query as to the construction of the statute does not affect the validity of the tax. The matter is further complicated by Section 409, which relates to liens, and says, among other things (this is also new in the Act of 1918), that if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if the tax in respect thereto is not paid (*i. e.*, by the executor) when due, then the beneficiary shall be personally liable (to the United States) for such tax, and the beneficiary's interest under such contract of insurance shall be subject to a lien equal to the amount of such tax. This section is printed at length in the appendix to this brief at page 10 a.

What Congress meant when it passed this Act is plain. It meant to impose a tax, to be paid in the first instance by the executors, and eventually to be borne in part by the residuary legatees and in part by the beneficiaries under the policies. The relative amounts to be borne by each vary in different cases with the value of the gross estate, with the amount of the taxable insurance, and with the disposition made by the decedent of his estate. The proportion of the tax to be borne by the estate and by the beneficiaries changes with the amounts of these three variable factors. In the instant case, at the time of the trial in the court below, the proportion to be borne by the estate was approximately 11 per cent., and that to be borne by the beneficiaries of the insurance policies, approximately 89 per cent. The method by which these percentages are arrived at is explained in the appendix to this brief at page 52 a. The whole 100 per cent., however, was, in the first instance, required under the law to be paid, and in this case actually was paid out of the estate. Congress gave the executors a separate cause of action over against each of the beneficiaries for their proportion of a part of it. In addition, Congress made each beneficiary personally liable to the United States for the whole tax in case the executors failed to pay,

and imposed a lien upon the contract of insurance for the amount of the whole tax.

The tax was levied on the life insurance policies in this case according to the graduated rates set forth in section 401 (appendix to this brief, page 1 a). To determine the rate at which the policies were to be taxed the collector took the total value of the policies which belong to Mrs. Frick and Miss Frick, the proceeds of which were actually paid to them by the insurance companies, to-wit, the sum of $474,629.52, less $40,000, or $434,629.52, and added that amount to the net taxable value of the whole of Mr. Frick's estate. This resulted in taxing the insurance policies at the highest rate specified in Section 401, to-wit, at 25 per cent. At this rate the tax on the $434,629.52 amounts to $108,657.38. The legality of this tax is the sole subject of controversy in this case.

Now the amount received by Mrs. Frick on the policies belonging to her was $220,828.09, and that received by Miss Frick on her policies was $253,801.43. At the rates specified in Section 401, the tax on these amounts, calculated independently of the value of Mr. Frick's estate, would be as follows: The tax for which Mrs. Frick would be liable would be calculated on the principal amount of $220,828.09, which she received, less an

exemption of $40,000, leaving a taxable amount of $180,828.09. The first $50,000 would bear a tax of 1 per cent., or $500; the next $100,000, a tax of 2 per cent., or $2,000; and the remaining $30,828.09, a tax of 3 per cent., or $924.84; thus the total tax which would have to be borne by Mrs. Frick would be $3,424.84. Accordingly, the average rate of the tax upon her policies would be 1.55 per cent. So, in the case of Miss Frick, the tax for which she would be liable would be calculated on the principal amount of $253,801.43, which she received, less an exemption of $40,000, leaving a taxable amount of $213,801.43. The first $50,000 would bear a tax of 1 per cent., or $500; the next $100,000, a tax of 2 per cent., or $2,000; and the remaining $63,801.43, a tax of 3 per cent., or $1,914.04; thus the total tax which would have to be borne by Miss Frick would be $4,414.04. Accordingly, the average rate of the tax upon her policies would be 1.74 per cent. The result of this will be seen at once. The total amount justly chargeable to Mrs. Frick and Miss Frick, on any lawful tax classification which can be conceived, would amount in the aggregate to $7,838.88, and not to $96,234.10; and the average rate of tax would be properly 1.6 per cent., and not approximately 20 per cent.

The proportionate amounts of the tax on the insurance policies to be borne by the estate and

by the beneficiaries of the policies also vary with the disposition which the testator makes of his estate. This is so because by the terms of the Act, the sum of a testator's gifts to charity is not taxable. The calculations we have used are based on the bequests contained in Mr. Frick's will, by which he gave substantially three-fourths of his estate to nontaxable charities. What the percentages would have been if the bequests given to charities had been given to taxable beneficiaries is shown by the calculations in the appendix to this brief at page 53 a.

C. DESCRIPTION OF THE INSURANCE POLICIES.

These policies of insurance (eleven in number) were taken out by Mr. Frick many years before the first Federal Estate Tax Act was passed in 1916. Such of them as were taken out in the name of Mrs. Frick, or were assigned to her, were taken out before there was any Federal Estate Tax Act. The policies assigned to Miss Frick were all assigned to her before the Federal Estate Tax Act of 1918 was passed, in which a tax on insurance policies first appeared.

A summary has been printed in the appendix to this brief at page 12 a, containing brief descriptions of the eleven insurance policies and classifying them to show the distinctions between the different kinds.

It will be seen by reference to this summary that there are four classes of policies involved in this case: (1) policies originally taken out in the name of a beneficiary other than Mr. Frick's estate, and containing no power to enable the insured to change the beneficiary; (2) policies which were originally made payable to Mr. Frick's estate and contained no provision for a change of beneficiary, but which were subsequently assigned by Mr. Frick to his wife or daughter, if she survived him, without reserving power to revoke the assignments; (3) policies which were assigned with powers reserved to revoke the assignments; and (4) policies which were originally made payable to Mr. Frick's executors, and which subsequently by arrangement with the company (a supplemental contract) he made payable to his daughter as beneficiary without reserving power to change the beneficiary.

NOTE.—It will be observed that the assignments of such of the policies as were assigned were very formal. For example, the assignment of Mutual Life Insurance Company Policy No. 163,109 recites that it is made in consideration of "one dollar, to me in hand paid, and for other valuable considerations;" and also, that Mr. Frick did for himself, his "executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators, and assigns, and their title to the said policy will forever warrant and defend." See appendix to this brief, p. 20 a.

POINT I.

The policies of insurance which were taxed in this case were property which belonged, not to Mr. Frick's estate, but to the beneficiaries.

We believe that every one will concede that a contract is property, that a promise to pay money is property. But since the proposition leads inevitably to the invalidity of the tax, we will support it by authorities.

An attempt was made by the Government in the court below to point out some differences, as affecting the ownership of these policies, because some of them contain certain options which Mr. Frick might have exercised, and because when Mr. Frick assigned some of them he reserved in the assignments certain powers. As far as the policies are concerned, it would seem to be perfectly clear that so long as Mr. Frick did not exercise any of the options contained therein, the contracts remained as written. It would seem to be equally clear that so long as he did not exercise any of the powers which he reserved, the contracts were not affected by them.

These questions will be argued more at length later; but, for the sake of clearness about the nature of the policies, let us consider the largest of them, and perhaps the simplest one. This is the paid-up policy of the Equitable Life Assurance Society No. 164,814, on which the insurance company paid Mrs. Frick $114,000. This policy was issued on November 23, 1901, eighteen years before Mr. Frick died. After it was issued neither Mr. Frick nor any one else paid any premiums. A single consideration was paid when the policy was issued, to wit, the surrender of a matured policy, which then belonged and was payable to Mrs. Frick, of the cash value of $60,426.00 (Record, p. 19), which made this a fully-paid policy. The policy was a simple contract by which the Equitable Life Assurance Society agreed for a present adequate consideration to pay Mrs. Frick $114,000 when Mr. Frick died, if she were then living, and if not, to Mr. Frick, his executors, etc. Mr. Frick had no right to interfere in any way with this policy. After it was made, it was solely and only a contract between his wife and the company. A copy of the policy is printed in the appendix to this brief at page 23 a.

NOTE.—The reason for printing a copy of this policy in the appendix is that while photostatic copies of all the policies, assignments, checks, etc., were attached to the original stipulation in this case and are part of the certified record which is filed in this Court, when it came to printing the record a stipulation was signed at the request of the Solicitor General, which provided that they need not be printed, but that the "omitted matter, however, shall be considered a part of the record before the Court, and either party may refer to such portions thereof as counsel may consider material" (Record, p. 49). Therefore as a matter of convenience to the Court in referring to this policy, and deeming essential a thorough understanding of just what the contract was which was entered into by the insurance company and Mrs. Frick, we have thought it best to print this policy at length.

We pass discussion of the question whether or not such a policy as this is within the meaning of the statute, that is, whether the amount received by Mrs. Frick was "insurance under policies taken out by decedent upon his own life," but call the attention of the Court to the fact that the Department has itself declared a policy for which the premium was paid by the beneficiary not to be taxable within the meaning of the statute (See Regulations 37, Article 32, a copy of which is printed in the appendix to this brief at page 35 a).

This particular policy was indubitably "property," and just as indubitably the owner of that property was Mrs. Frick.

It does not seem necessary to cite any cases

specifically bearing upon the question of the ownership of this one policy. That question is discussed in connection with the cases cited for the broader proposition that the Government cannot successfully distinguish in the matter of ownership between this policy and some of the other policies which gave Mr. Frick power to receive dividends or to surrender the policies and take down the cash at the end of certain periods, or between this policy and certain other policies originally made payable to himself which he assigned to beneficiaries, reserving power to revoke the assignments and to designate other beneficiaries, without, however, having subsequently exercised the options or the reserved powers.

We shall not attempt to refer to all the authorities. The discussion of the subject by Chief Justice Rugg in the case of

Tyler, Administratrix, vs. Treasurer and Receiver General,
226 Mass., 306 (1917),

in which life insurance policies were held not taxable as gifts made or intended to take effect in possession or enjoyment at the death of the grantor, is so conclusive that it does not seem necessary to do more than quote from his opinion. He says, beginning at the bottom of page 307:

> "A policy of life insurance is a contract. It is commonly a tripartite agreement, to which the parties are the insured, the insurer

and the beneficiary. A policy of life insurance is a contract for a consideration paid, usually in money, in one sum or at different times during the continuance of the risk, which involves the payment of money or other thing of value by the insurer to the family, kindred, representative, or other designated beneficiary of the holder of the policy, conditioned upon the continuance or cessation of human life, or which involves a guaranty, assurance or pledge of an endowment or an annuity. *Commonwealth vs. Wetherbee,* 105 Mass., 149, 160. See St., 1907, c. 576, Sec. 66; *Curtis vs. New York Life Ins. Co.,* 217 Mass., 47. The rules applicable to the interpretation and enforcement of policies of life insurance are those which govern contracts. *Davis vs. New York Life Ins. Co.,* 212 Mass., 310. While speaking with technical accuracy, a beneficiary is not a party to a policy of life insurance and could not at common law maintain an action in his own behalf, yet he has an equitable interest in the policy and can maintain an action for his own benefit in the name of the personal representatives of the insured, and by statute is enabled to bring an action in his own name. *Campbell vs. New England Mutual Life Ins. Co.,* 98 Mass., 381, 400; St. 1907, c. 576, Sec. 73. The rights of the beneficiary are thus protected by the law and by the statute. The rights of the beneficiary attach at once upon becoming so designated by the terms of the contract. *Pingrey vs. National Life Ins. Co.,*

144 Mass., 374. Where the beneficiary is the wife of the insured, her rights instantly vest upon a meritorious consideration. *Bailey vs. Wood,* 202 Mass., 562. It has been said that, apart from any statutory provision, the designation of a beneficiary in a policy of life insurance is in the nature of an executory trust for his benefit of which he cannot be deprived without his consent. *Boyden vs. Massachusetts Mutual Life Ins. Co.,* 153 Mass., 544, 546. Said Chief Justice Fuller in *Central Bank of Washington vs. Hume,* 128 U. S., 195, at page 206: 'It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries * * * *Gould vs. Emerson,* 99 Mass., 154; *Knickerbocker Life Ins. Co. vs. Weitz,* 99 Mass., 157.' The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. They are in no wise modified or increased at the time of the death of the insured.

The contract of life insurance differs from most other contracts, in that it is not intended ordinarily for the benefit of the insured, but of some dependent. Its original and fundamental conception is a provision by small, periodical contributions to secure a

benefit for the family. While this conception has been enlarged in some respects, and especially in its commercial aspects, still the basic elements continue and are found in all the cases at bar. The insured retains no ownership of that which has passed to the beneficiary under the contract. *A reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last.* (Italics ours.) Whatever the insured does in way of designation of a beneficiary takes effect forthwith. If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary. *Attorney General vs. Clark,* 222 Mass., 291. There is no fund in which he has an ownership which is the subject of his act in designating the beneficiary, as in *New England Trust Co. vs. Abbott,* 205 Mass., 279, and *State Street Trust Co. vs. Treasurer & Receiver General,* 209 Mass., 373. The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence until after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay to the beneficiary. So far as the insured is a 'grantor,' to use the word of the statute, the only thing which he grants or can grant is an interest in a contract. So far as he can make a 'gift,' the only thing which he

has to give is a right in a contract. By designating a beneficiary both the 'grant' and the 'gift,' so far as either exist at all, take effect in enjoyment and possession at once. Such a relation does not by fair intendment come within the descriptive words of the statute as 'property * * * which shall pass * * * by gift * * * made or intended to take effect in possession or enjoyment after the death of the grantor.'"

See also

Elliott's Appeal, 50 Pa., 75;

Anderson's Estate, 85 Pa., 202;

Matter of the Transfer Tax Upon the Estate of Andrew Carnegie, 203 App. Div. (N. Y.), 91, affirmed by the Court of Appeals in a memorandum decision without opinion, 236 N. Y. 517;

Neary vs. Metropolitan Life Insurance Co., 103 Atl. Rep., 661 (Conn., 1918);

Holden vs. Insurance Company, 77 So. Carolina, 299 (1907);

Matter of Parson's Estate, 102 N. Y. Supp., 168 (Supreme Court, App. Div., 1907);

In re Voorhees' Estate, 193 N. Y. Supp., 168 (Supreme Court, App. Div., 1922);

Lloyd vs. Royal Union Mutual Life Ins. Co., 245 Fed., 162 (District Court, No. District of Iowa, 1917; Reed, D. J.).

We wish, however, in this connection to call particular attention to the decision of this Court in

Washington Central Bank vs. Hume,
128 U. S., 195.

This case involved the right of creditors of the insured to life insurance policies which were payable to insured's wife and children. While there does not seem to have been any provision in the policies for a change of beneficiaries, the reasoning of the Supreme Court, as expressed by Chief Justice Fuller, is quite conclusive on the point in controversy. He says, page 206:

> "We think it cannot be doubted that in the instance of the contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts which belong to the beneficiaries to whom they are payable.
>
> It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in

the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named. *Bliss on Life Insurance,* 2d ed., p. 517; *Glanz vs. Gloeckler,* 10 Appellate Court Illinois, 484, per McAllister, J.; *S. C.,* 104 Illinois, 573; *Wilburn vs. Wilburn,* 83 Indiana, 55; *Ricker vs. Charter Oak Ins. Co.,* 27 Minnesota, 193; *Charter Oak Life Ins. Co. vs. Brant,* 47 Missouri, 419; *Gould vs. Emerson,* 99 Mass., 154; *Knickerbocker Life Ins. Co. vs. Weitz,* 99 Mass., 157."

Again, the Court disposes of the question partly upon the effect of the Connecticut Statutes upon the right of property. The Court says, beginning at the bottom of page 206:

"This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions.

Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children, but if the annual premium exceed three hundred dollars, the amount of such excess shall

inure to the benefit of the creditors of the person paying the premiums.

The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

And again, beginning at the bottom of page 208:

"Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer."

The material parts of the statutes of New York, Connecticut, Massachusetts, New Jersey and Pennsylvania, which thus became part of these contracts of insurance, and which made the policies payable to the wife or child of the insured their absolute property, are printed in the appendix to this brief, p. 27 a.

All the authorities clearly establish the general proposition that the reservation of a power by the donor which was never exercised does not affect the vesting of the estate in the donee.

> *Jones vs. Clifton*, 101 U. S., 225;
> *Matter of the Transfer Tax Upon the the Estate of Andrew Carnegie*, 203 App. Div. (N. Y.), 91 (affirmed by the Court of Appeals, 236 N. Y., 517.
> *Matter of Miller*, 236 N. Y. 290.
> *Dolan's Estate*, 279 Pa., 582 (1924).

An attempt was made in the Court below to show that the existence of these options and powers, which were never exercised, prevented the "estate" from vesting in the beneficiary. We are at a loss to see what application this contention has to the case; for it is the estate of the beneficiary that is being taxed here. That estate, whether you call it vested or contingent, came into being when the contract which created the obligation to pay the policy to the beneficiary was made, and continued unmodified by the exer-

cise of options or powers right down to the death of the insured, when the policy became payable at once to the owner of the estate. It is perfectly clear that Mr. Frick's so-called rights were not "conditions of the vesting of the estate" (if we must use this inaccurate expression) but were simply conditional limitations.

In authorities as old as Littleton we find the illustration that an estate to A if he returns from Rome is a conditional estate. It does not vest any right in him until and unless he returns from Rome; but an estate to A until B returns from Rome is a vested estate in A. The sections of Littleton referred to are printed in the appendix to this brief, p. 36 a. The fact that A's estate is limited upon the uncertain contingency that if and when B returns from Rome A's estate shall cease, does not make the estate contingent though the contingency may never happen. It is simply a conditional limitation upon, not a conditional vesting of the estate.

Such has always been the law everywhere.

See

Bennett vs. Robinson, 10 Watts, 348 (1840);
Irvine vs. Sibbetts, 26 Pa., 477 (1856);
Cooper vs. Pogue, 92 Pa., 254 (1879), p. 257;
McArthur vs. Scott, 113 U. S., 340 (1885).

Judge Dickinson makes it very clear in his opinion in *Girard Trust Company vs. McCaughn*, decided February 4, 1925, that the estate of a remainderman limited on the life of the grantor "vests" in the remainderman at the time the deed is delivered and not at the time of the falling in of the life estate reserved. (See appendix to this brief, p. 72 a, 75 a, ff.)

Mrs. Frick's *right* (estate) became her property (vested) when the policy was issued or the assignment thereof was made, and could only be divested by a subsequent event (the failure to pay a premium, or the exercise of a power), which never happened. The existence of such unexercised powers in a donor does not subject the property given to taxation as part of his estate, *Dolan's Estate, supra; Matter of Miller, supra.*

In this connection it is well to bear in mind that the beneficiaries (Mrs. Frick and Miss Frick) had the right to pay the premiums and thus to prevent the policies from lapsing. See 25 Cyc., 751.

The Government contended in the court below that the insurance policies involved in this case were analogous to or had some of the characteristics of wills, and that the disposition of them made by Mr. Frick was a testamentary

disposition. This is manifestly unsound, but perhaps requires consideration.

We never have any difficulty in Pennsylvania in determining what a will is, or what passes by a will or under the intestate laws. Here, as elsewhere, this is controlled by statute. A will operates only by virtue of the statute, and it must measure up to the requirements of the statute or it is not a will. The Pennsylvania statute gives to every person of sound mind and of the age of twenty-one years, or upwards, the power to dispose by will of all his estate, real or personal, provided that the will is in writing, signed by him at the end, and proved by oath or affirmation of two or more competent witnesses; otherwise the alleged paper is not a will and is "of no effect." *West Publishing Co.'s Compilations of Pennsylvania Statutes,* Sections 8307 and 8308.

Neither these insurance policies nor the assignments thereof comply with the requirements of the statute; therefore they are not wills.

On the other hand, an insurance policy is the antithesis of a will. It is primarily and fundamentally a provision for his dependents, made by a man in his lifetime. It is, as we have

shown, their property both by form of contract and by statute, and the proceeds of the policy are not subject to the financial vicissitudes of the insured. It is not a part of his estate; it is not liable for his debts; it does not pass under his will; nothing new vests in the beneficiaries by reason of the insured's death.

POINT II.

The assessment of this tax under the provisions of Section 402 (f) of the Revenue Act of 1918 was illegal because that section of the Act is not retroactive.

The provision of the Act imposing a tax on life insurance policies taken out by a decedent on his own life and held by beneficiaries other than the estate does not apply to these policies, which were owned by the beneficiaries before the Act was passed.

The United States estate tax law imposes upon the estates of decedents a tax determined by what the Act calls the decedent's gross estate. In addition to what for all other purposes is regarded as constituting a decedent's estate, this Act includes in the gross estate, as it defines it, certain items of property which, though not unconnected with the past activities of the decedent's lifetime, are not at the time of his death part of his estate for the payment of debts or for distribution or for any other than the artificial purpose of determining the tax in accordance with the language of the Act. Those items are: (1) gifts and trusts made by the decedent in contemplation

of death, or to take effect at death; (2) property conveyed to the decedent and some other person and held by them at the time of the decedent's death as joint tenants or tenants by the entireties, with the right of survivorship; (3) policies of life insurance taken out by the decedent on his own life and made payable to persons other than the decedent's executors. (These provisions are printed in the appendix to this brief at page 3 a, ff). Such policies of life insurance are the sole subject of the controversy in this case.

The three provisions of the Act which accomplish this extraordinary classification of property are very similar in their terms and are identical in the fact that, as originally enacted, they did not contain any language that required them to have a retrospective application. They contained no hint that they were to be applied to any trusts, gifts, entireties, or life insurance policies other than those made after the passage of the Act.

This is the natural meaning of the language used. And that such was the meaning that Congress actually had in mind when it enacted the statute is shown by the fact that since the provisions were originally enacted Congress has from time to time added to one or another of the clauses language making it retroactive, until

finally in the Act of 1924 it introduced language making them all retroactive.

But this is not all. The first two of the three original provisions have already been passed upon by this Court and have been construed not to be retroactive. The question came before the Court in 1922 in four cases which were considered and disposed of together by the unanimous decision of the Court in opinions written by Mr. Justice McKenna. These cases are: *Shwab vs. Doyle, Union Trust Company vs. Wardell, Levy vs. Wardell* and *Knox vs. McElligott,* 258 U. S., 529 ff.

Shwab vs. Doyle and *Union Trust Company vs. Wardell* were cases of trusts created by the decedents before the passage of the Act. *Levy vs. Wardell* involved a gift of capital stock made in contemplation of death before the passage of the Act, and *Knox vs. McElligott* was the case of an estate by entireties created before the Act was passed.

With respect to retroactivity, these four cases are identical with one another and with the case of *Lewellyn vs. Frick's Executors,* now before the Court. There is not in the facts of any of them any distinction more significant, with respect to retroactivity, than whether Doyle, War-

dell, McElligott, or Lewellyn was the collector who levied the unlawful tax. Let us see what the language of the Act is and what the reasoning of the decided cases is.

The tax was collected under one of three parallel provisions of Section 402 of the Revenue Act of 1918, by which Congress sought to tax as part of decedents' estates things which are not in fact the property of the decedent at the time of his death. These provisions of the Act are:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institu-

tions in their joint names and payable to either or the survivor, * * *

* * * * * *

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." (Matter in italics and all of subdivision (f) are new in the Act of 1918. Italics ours.)

This section is printed at length in the appendix to this brief, p. 3 a.

In *Shwab vs. Doyle,* the decedent had, in her lifetime, by a deed dated April 21, 1915, created a trust. She died September 16, 1916, seven days after the Revenue Act of 1916 was passed and became effective. In an action against the Collector to recover the amount collected under Section 202 (b) of that Act as a tax on the value of the property conveyed, the lower court gave judgment for the defendant, which was affirmed by the Circuit Court of Appeals. This Court reversed the judgment, basing its decision on two propositions: (1) That tax laws are strictly construed, and (2) that laws are not to be considered to apply to cases that arose before their

passage unless the intention be clearly expressed. Mr. Justice McKenna said in the opinion (p. 534):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. *1 Kent,* 455; *Eidman vs. Martinez,* 184 U. S., 578; *White vs. United States,* 191 U. S., 545; *Gould vs. Gould,* 245 U. S., 151; *Story, Const.,* §1398."
>
> (p. 535): "If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected."

Union Trust Company vs. Wardell and *Levy vs. Wardell,* involving the applicability of the same subdivision to very similar facts, were decided on the authority of *Shwab vs. Doyle.* The language construed in *Levy vs. Wardell* gave much more basis for saying that a retroactive effect was intended than does that used in the insurance tax provision. If a provision imposing a tax on property "to the extent of the interest therein of which the decedent has *at any time* made a transfer" does not apply to transfers completed before the Act was passed, surely policies "taken out" by the decedent during his lifetime are not within the taxing provision.

The conclusion to be drawn from these cases, that the provisions of Section 402 (f) of the Revenue Act of 1918, being substantially identical with those of Section 202 (b) of the Act of 1916, are not to be construed as applicable to transactions completed before the enactment of the taxing statute, becomes irresistible in the light of the history of the Revenue Acts. Until the Act of 1918 took effect, none of the subdivisions of the present Section 402 had been expressly made retroactive; but in that Act, realizing that the provisions of subdivision (c), relating to transfers made in contemplation of death, did not cover transfers completed before the enactment of the statute, Congress inserted in that subdivision the words "whether such transfer or trust is made or created before or after the passage of this Act." The significant thing is that Congress, although its attention was specifically directed to the fact that none of the provisions in Section 402, as they then read, were applicable to past transactions, chose to make them so only in the case of transfers made in contemplation of death. That in itself is a legislative declaration that the other provisions were not intended to be retroactive in their operation in the Act of 1916, nor, *a fortiori*, in the Act of 1918, in which the provision as to insurance policies was first inserted.

Exactly this construction was adopted by this Court in *Knox vs. McElligott*, 258 U. S., 546. In that case, the Commissioner of Internal Revenue had assessed an estate tax, under Section 202 (c) of the Act of 1916, as amended in 1917, upon the total value of a joint estate created before the passage of the Act. In the Revenue Act of 1918, Congress had expressly made the provision taxing gifts made in contemplation of death retroactive, but had left subdivision (c) untouched. The history of that provision is, therefore, exactly parallel to that of the insurance tax provision, which likewise was left unchanged by later acts, until 1924. Not only is the history of these provisions parallel, but the phraseology employed in each is strikingly similar. Subdivision (c) covered interests "held" jointly, or "deposited" in joint names; subdivision (f) of the 1918 Act covers proceeds of policies "taken out" by the decedent upon his own life. A closer parallel of grammatical construction can scarcely be imagined; the only difference lies in the phraseology necessary to make appropriate reference to the particular interests attempted to be taxed. In *Knox vs. McElligott*, this Court held that the language quoted did not cover joint estates created before the passage of the Act, quoting with approval the language of Judge Mayer in the trial court (*Kissam vs. Mc-*

Elligott, 280 Fed., 212, 217): "It is true that section 201 provides that the tax is imposed upon the transfer of the net estate of 'every decedent dying after the passage of this act'; but the assumption must be that this relates to estates thereafter created, and not to then existing vested property."

In *Levy vs. Wardell,* stock transferred by gift before the passage of the Act of 1916 was held not to be included in property "with respect to which he (the decedent) *has created* a trust." In *Shwab vs. Doyle* and *Union Trust Company vs. Wardell,* trusts created before the passage of the same Act were held not to be included in property "of which the decedent *has at any time made* a transfer." In *Knox vs. McElligott,* property conveyed to decedent and his wife jointly before the passage of the Act was held not to be taxable as property "*held jointly* * * * by the decedent and any other person." In each case the use of the perfect tense or of the past participle was given effect only from the operative date of the Act. The exactly parallel language employed by Congress with reference to proceeds of insurance policies is entitled to the same strictly prospective construction. It must therefore follow that policies taken out and assigned before the passage of the Act of 1918

are not taxable as "policies *taken out* by the decedent." The Government's position would require subdivision (f) to be construed as though it read, as the provisions construed in the *Doyle* and *Wardell* cases were later amended to read, namely: "* * * to the extent of the excess over $40,000 of the amount receivable by any other beneficiaries as insurance under policies taken out by the decedent upon his own life, *whether such policies were taken out before or after the passage of this Act.*"

But that this is not the meaning attached by Congress itself to the language under discussion is shown by the subsequent history of the provisions mentioned. No language was inserted in the Act of 1921 to make any other provisions of Section 402 retroactive; but in Section 302 of the Revenue Act of 1924 Congress, after adding an entirely new subdivision and re-enacting in substantially the same language the other subdivisions of Section 402 of the two prior Acts, provided as follows:

> "(h) Subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing,

exercised, or relinquished before or after the enactment of this Act."

By thus making subdivision (g), the language of which is exactly the same as that of subdivision (f) of Section 402 of the Acts of 1918 and 1921, applicable to all transfers, etc., made before the enactment of the Act of 1924, Congress conceded that the language of the earlier acts did not apply to the proceeds of policies taken out before this Act went into effect. Such has been the uniform construction placed upon changes in statutory language by this Court.

> *Shwab vs. Doyle,* 258 U. S., 529;
> *Smietanka vs. First Trust & Savings Bank,* 257 U. S., 602;
> *United States vs. Field,* 255 U. S., 257.

A more detailed discussion of these and other cases on this point will be found in the appendix to this brief, at page 37 a.

The conclusion that the provisions of Section 402 (f) are not applicable to the proceeds of insurance policies taken out and assigned long before this Act was passed is further supported by numerous decisions in this and other courts holding, as was held in *Shwab vs. Doyle,* that tax laws are to be strictly construed in favor of the taxpayer. Of the many cases establishing

this proposition, only a few decided by this Court will be mentioned here.

> *United States vs. Merriam*, 263 U. S., 179;
> *Gould vs. Gould*, 245 U. S., 151;
> *Eidman vs. Martinez*, 184 U. S., 578.

These and other cases on this point are discussed in the appendix to this brief, at page 41 a.

In regard to the general principle, followed in *Shwab vs. Doyle*, that laws not remedial in their nature are not to be applied retrospectively in the absence of language compelling such a construction, it is hardly useful to add more than the famous remark of Chief Justice Marshall in *Reynolds vs. McArthur*, 2 Pet., 417, 434:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable."

A further cogent reason why subdivision (f) should not be construed to apply to the proceeds of policies taken out or assigned from 2 to 35 years before its enactment, rests on the fact that the contrary construction, insisted on by the

Government, is open to a number of serious constitutional objections. To show that these objections are indeed of so serious a character that if the act is construed to apply to the proceeds of these policies, it must necessarily be held to be unconstitutional, is the object of the arguments contained in the remainder of this brief.

The established practice of this Court to avoid giving to a statute a construction which involves constitutional difficulties was only recently affirmed by Mr. Justice Van Devanter in *Panama Railroad Co. vs. Johnson,* 264 U. S., 375, as follows (p. 390):

> "But, as this Court has often said, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' *U. S. vs. Jin Fuey Moy,* 241 U. S., 394, 401; *U. S. vs. Delaware & Hudson Company,* 213 U. S., 366, 407-408; *Baender vs. Barnett,* 255 U. S., 224."

Further discussion of this point is to be found in the appendix to this brief, at page 44 a.

The language of subdivision (f) of Section 402, under which this tax was collected, does not in terms include the proceeds of the policies in

question. It is not to be construed retroactively in the absence of unequivocal language compelling that construction. If ambiguous, it is to be construed in favor of the taxpayer, and so as to avoid the grave constitutional difficulties which inhere in the Government's position. By all the canons of construction, and in the light of the prior and subsequent legislative history of this and its companion provisions, it must inevitably follow, on the authority of the cases decided by this Court, that Congress did not intend by the provision in question to impose an estate tax retroactively upon policies of insurance taken out and assigned at a time long prior to the enactment of the taxing act. *Knox vs. McElligott; Shwab vs. Doyle.*

POINT III.

Even should it be deemed that the Act was intended by Congress to be retroactive, the tax was illegally levied (a) because such a tax is in fact a direct tax and (b) because it is not due process of law for Congress to levy a retroactive tax on these insurance policies.

(a) Even if it should be held by this Court that the provisions of Section 402 (f), as a matter of construction, apply to the proceeds of these insurance policies, the Act imposes an unconstitutional tax in the form of an excise upon the creation and transfer of the rights in the policies, since these transactions were completed at a time long prior to the enactment of the taxing statute.

There can be little doubt that Congress intended, by Section 402 (f), to impose what is in form an excise tax, on the proceeds of policies to be taken out thereafter, proceeding on the theory that such policies are in substance a part of the estate of the insured. The Government may insist, however, in spite of the cases examined above, under Point II, that the Act imposed on policies of insurance an excise tax of the same nature as that imposed under the parallel pro-

visions taxing survivorship in joint estates and transfers made in contemplation of death, namely, an excise on the cesser of the right in the transferor or on the creation of the right in the transferee, to be collected at the time of the death of the transferor. This would amount, of course, to saying that Congress has the constitutional power to impose a tax of this description upon the exercise of privileges by Mr. Frick during his lifetime, in creating or transferring the property rights which these policies represented, although the transactions were in every case completed from over two to thirty-five years before the Act was passed. The position of the defendants in error on this point is that, in reason and on the authorities, a privilege tax imposed on the transfer of property after the privilege of transfer has been exercised is not a privilege tax at all, but a tax imposed because of the ownership of the property, and therefore a direct tax which is unconstitutional if not apportioned among the states; and further, that such an imposition is not even a tax, but an arbitrary taking of property within the prohibition of the Fifth Amendment. This position is based on the decisions and language of this Court and of numerous state courts.

It is not contended that a tax is direct because its *burden* cannot be shifted to another; on that point, as Mr. Justice Holmes remarked in *New York Trust Company vs. Eisner,* 256 U. S., 345, 349, "a page of history is worth a volume of logic." But it is contended that a tax imposed in the form of a privilege tax upon a past dealing with property is in substance a tax upon the property itself because the taxpayer cannot avoid the *imposition* of the tax by refraining from doing the act taxed. Such a tax is a tax imposed simply because of the ownership of property.

The decisions of this Court and lower federal courts support the position that a retroactive tax is not an excise tax at all, but a direct tax requiring apportionment, since it is consistently recognized that a tax cannot be an excise unless "the element of absolute and unavoidable demand is lacking." *Thomas vs. United States,* 192 U. S., 363, 371; *Flint vs. Stone Tracy Company,* 220 U. S., 107, 151; *Singer vs. United States,* 15 Wall, 111, 120; *Patton vs. Brady,* 184 U. S., 608, 623. The tax, on the present hypothesis, if presently imposed as an excise upon a past dealing with property, is accordingly not within the legal definition of an excise tax, and must therefore be either a direct tax upon the person, imposed by reason of his past acts, or a direct tax upon the

property transferred. A tax upon the proceeds of insurance policies by reason of past transactions with relation to them is a direct tax within the definition adopted by Chief Justice Fuller in the *Pollock Case*, 157 U. S., 429, 558: "A tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes." It is a property tax within the same definition, as applied by this Court in *Dawson vs. Kentucky Distilleries Company*, 255 U. S., 288, holding a tax on whisky withdrawn from bond or exported in bond to be such a tax. It is a direct property tax under the holding of *Eisner vs. Macomber*, 252 U. S., 189, 217, in which a tax on stock dividends, that is, on profits *accumulated in the past* and still undivided, was held to be a direct tax requiring apportionment. It is a direct tax within the meaning of that term adopted in *Nicol vs. Ames*, 173 U. S., 509, 521, in which Mr. Justice Peckham remarked that a tax on "every sale made in any place * * * is really and practically upon property." Finally, it is a direct tax under the specific holding of *In re Pell*, 171 New York, 48.

A more detailed treatment of these cases is to be found in the appendix of this brief at page 58 a.

(b) Not only is this tax a direct tax, but it is submitted that a tax in *any form,* imposed upon the creation or transfer of property rights at a time long past, is in substance not a tax but an imposition so arbitrary and unreasonable as to amount to a confiscation of property within the prohibition of the Fifth Amendment.

We are not unmindful of the repeated expressions of this Court that the Fifth Amendment does not limit the taxing power of Congress. It does not follow, however, that by affixing a tax label Congress can exceed its constitutional powers. This Court has, accordingly, pointed out in several instances that a seeming exercise of the taxing power, which is in fact arbitrary and confiscatory, is not within the taxing power of Congress, because it is *not a tax* but a deprivation of property without due process of law. This was stated in so many words by Mr. Chief Justice White in *Brushaber vs. Union Pacific Railroad Company,* 240 U. S., 1, 24, 25:

> "And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclu-

> sion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

That this Court will not permit a mere tax label to blind it to the unconstitutionality of a taxing act was conclusively demonstrated in the *Child Labor Tax Case*, 259 U. S., 20, and in *Hill vs. Wallace*, 259 U. S., 44.

That a tax on property transactions of a time long past is an imposition too arbitrary to be within the power even of a State, was held in *In re Pell, supra*, and several other State cases, a more detailed discussion of which will be found in the appendix to this brief at page 46 a.

The reason why a present tax on the issuance or assignment of policies in the past is arbitrary must be plainly apparent. As has been pointed out (*supra*, p. 11), the Act gives the executors a right to a partial reimbursement by the beneficiaries. This is neither more nor less than a tax on the beneficiaries, imposed, as must be here assumed, upon the creation of their interests in them in the past. Let us see what the

outcome of such a method of taxation must be. In 1900, A and B take out policies of insurance in the amount of $100,000 each, in favor of C and D, respectively. We pass here the fact that the amount of tax, if any, payable by C and D when A and B die, will depend not only on the wealth of A and B at their death, but also on the disposition they may happen to have made of their property. The point here is that C may have to pay no tax at all, if A should die in 1912, while D may have to pay a tax at the high average rate applicable to the estate of B, under the tax law happening to be in force at the time of B's death. A tax the rate and very incidence of which is to be determined by purely adventitious circumstances at a future time, is arbitrary at the very mildest. It falls squarely within the condemnation of the tax held unconstitutional in the *Pollock Case*, voiced by Mr. Justice Field, at 157 U. S., 599:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of *equal and uniform apportionment among the persons taxed*, and any other exaction does not come within the legal definition of a tax.
>
> This inherent limitation upon the taxing power forbids the imposition of taxes which

> are unequal in their operation upon similar kinds of property, * * *."

The Constitution requires duties, imposts and excises to be uniform throughout the United States. Art. I, Sec. 8. The kind of uniformity requisite under this provision appears from *United States vs. Singer,* 15 Wall., 111, in which Mr. Justice Field justified the excise tax on distilleries measured by capacity as follows (p. 121):

> "The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distillery and a different rule for another, but the same rule for all alike."

This law, if it in fact taxes the original creation of rights in the beneficiaries, does more than establish one rule for one beneficiary and another rule for another; it decrees that C shall not be taxed on his policy at all if it be his fortune that A was already dead when the taxing act was passed, while D, whose right was of equal value and was created at the same time as C's, is to be taxed on his policy at a rate to be determined by circumstances altogether beyond his control. This is not taxation. It is confiscation. It is deprivation of property without due process of law.

POINT IV.

It was not due process of law to levy and compel the executors to pay an estate transfer tax on property which was not part of the decedent's estate, but which belonged to Mrs. Frick and Miss Frick.

Such a tax is unconstitutional because—

(1) It is unequal; it is a deprivation of property without due process of law.

(2) The remedy over sought to be given to the executors against the beneficiaries is inadequate,

(a) Because a mere cause of action to recover is not the equivalent to immunity from taxation; and

(b) Because the act attempts to give the right to recover only a part of the amount which the estate has to pay.

1. The tax imposed in this case is invalid because it violates the Fifth Amendment. It is a deprivation of property without due process of law. This is true regardless of the theory upon which the tax is imposed.

The proposition contended for by the Government, as applied to the facts in this case, is that the United States can levy an estate tax, an *ad valorem*, transfer, excise capital tax amounting to 25 per cent. of the value of Mr. Frick's estate at the time of his death and include in the value of the estate, as the basis of the tax, property which belonged to others at the time of Mr. Frick's death.

This is not taxation. It is confiscation. It is the taking of property for public use without compensation. It lacks the element of uniformity and universality, which is essential to a tax.

As stated before (see this brief, p. 10), what Congress attempted to do was to impose (1) a liability upon the executors to pay the whole of the tax, giving them a personal cause of action over against the beneficaries for a portion of that which the executors must pay; (2) if the executors fail to pay, then (a) a personal liability upon the beneficiaries to the United States for the payment of the tax; and (b) a lien upon the policies and the proceeds thereof for the amount of the tax.

What we are discussing under this point is the illegality of making the executors pay this tax upon property which belonged, not to the

estate, but to the beneficiaries, upon property which was not a part of Mr. Frick's estate, which never came into the executors' hands, and over which they had no control.

That the tax imposed by the Revenue Act of 1918 is an excise tax founded upon the termination of Mr. Frick's title has been expressly held by this court in cases involving the application of that act.

> *Y. M. C. A. vs. Davis*, 264 U. S., 47;
> *Edwards vs. Slocum*, 264 U. S., 61.

In the latter case the nature of the tax imposed by the Act of 1918 was stated by Mr. Justice Holmes to be as follows, at pp. 62 and 63:

> "But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton vs. Moore*, 178 U. S., 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as *Hanson, Death Duties*, puts it in a passage cited in 178 U. S., 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death'."

In *Knowlton vs. Moore*, 178 U. S., 41, in which the tax imposed by the Revenue Act of

1898 was sustained as a death duty, Mr. Justice White stated at the top of p. 56 that the tax is founded in its "essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

One must bear in mind when reading *Knowlton vs. Moore*, that it was conceded that the United States had no power to say who should succeed to the dead man's estate, that that was a power vested exclusively in the states. Therefore some theory had to be adopted in *Knowlton vs. Moore* which would justify the tax law as a *tax law*, not as a wills act or an escheat act. The question then necessarily came up whether it was a direct tax or an excise tax. It could manifestly not be sustained as a direct tax; so it was sustained as an excise tax, but only upon historical grounds as a death duty.

Our proposition that you cannot include in the value of the taxable thing the value of some other thing is a fundamental point in the following cases:

> *Pullman's Palace Car Co. vs. Pennsylvania*, 141 U. S., 18;

Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania, 198 U. S., 341;
Union Refrigerator Transit Co. vs. Kentucky, 199 U. S., 194;
Southern Pacific Company vs. Kentucky, 222 U. S., 63;
Wallace vs. Hines, 253 U. S., 66.
Air-Way Corp. vs. Day, 266 U. S., 71.

So the Circuit Court of Appeals for the 9th Circuit held in *Wardell, Collector, vs. Blum,* 276 Fed., 226, 227, that "All inheritance taxes are imposed on the transfer of the net estate of the 'deceased'; * * * *the property upon which such a tax is imposed must in truth be the property of deceased.*" (Italics ours.) The court held that as to community property the wife could only be taxed on the half that she inherited from her husband, not on the whole value of the property which before his death had belonged to each of them, half and half, under the laws of California.

So likewise Mr. Justice Holmes says in his dissenting opinion in *Chanler vs. Kelsey,* 205 U. S., 466, at page 480, that if a tax must be held to be a succession tax in order to make it valid it follows that such tax cannot be levied except where there is a succession, "but if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the con-

tinuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, * * *."

This statute arbitrarily makes something a part of the estate which is no part of it.

Mr. Frick's executors are simply the *locum tenens* of the property of which he died possessed. The executors have no right to or interest in any part of this insurance. Upon what principle, then, can Congress add the property of somebody else to the property of the decedent for the purpose of increasing a transfer tax against the decedent's estate?

2. The remedy over provided for the executors is inadequate.

Congress was apparently impressed with the incongruity of adding the property of somebody else to the property of the decedent in order to swell the gross estate and increase the tax, and, therefore, attempted to make the absurdity sensible by putting the executor in a situation where he could not complain, because he could recoup himself by recovering the amount of the tax levied on account of property not belonging to

the estate from the person to whom the taxed property belonged. Even this excuse, however, does not apply in this case to $12,423.38, the difference between the total tax and the part of it for which the law gave the executor a cause of action against the owners of the property. As to this $12,423.38, the estate suffers a total loss. This becomes even more apparent because, under the provisions of the statute and the terms of Mr. Frick's will, all the inheritance taxes are thrown upon the residuary estate.

It should be remembered that the rate of tax shifts under the provisions of Section 402, (a) according to the value of the decedent's estate; (b) according to the disposition that decedent makes of his estate as between taxable and non-taxable distributees; and (c) according to the amount of insurance. (See p. 14 ff. of this brief.)

It may be somewhat elementary, but it is well at this point to bear in mind also that it is a fundamental of the theory of taxation that there must be some corresponding protection given by the Government either to the person or to the thing taxed, and that a tax "is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority, in the exercise of the taxing power, *the contri-*

***bution being of a proportionate character,* * * *".** 37 Cyc., 708 (Italics ours.) See *Union Transit Co. vs. Kentucky,* 199 U. S., 194, 202.

This Court has frequently announced that, while a tax is basically a charge for the support of government, it cannot be made the means of imposing upon one man the burden which should be borne by another.

In *United States vs. B. & O. R. R. Co.,* 84 U. S., 322, it was held that the Federal tax upon the interest of railroad bonds could not be collected as against the bondholder, a municipal corporation. Conceding that the Railroad Company could lawfully be made the collector of the tax, if valid, this Court plainly intimated that if a real burden were placed upon the Railroad Company, the tax would be invalid, Mr. Justice Hunt declaring on page 326:

> "It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property."

The same proposition is laid down by Mr. Justice White in *Knowlton vs. Moore,* 178 U. S., 41, at pages 76 and 77, a case referred to more at length in the discussion under Point V (1) of this brief.

The reason why this must be so, in the case of an attempted exercise of the power of taxation, is plainly stated by Mr. Justice Miller in *Loan Association vs. Topeka,* 87 U. S., 655, in which a State tax for private purposes was held void, at pages 663-664:

> "There are limitations on such power which grow out of the essential nature of all free governments. * * * No court, for instance, would hesitate to declare void a statute * * * which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.
>
> Of all the powers conferred upon government that of taxation is most liable to abuse. * * *
>
> To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

One might suppose it to be altogether too plain for argument that no legislature has constitutional power to do what Congress has attempted to do here, namely, to compel the estate to pay a stranger's tax, and yet this Court has had occa-

sion to condemn an enactment of this very sort. When the State of Virginia sought to collect a tax on its own bonds out of interest payable on detached coupons, this Court took its stand once for all against this sort of legislative irresponsibility. The unconstitutionality of the Virginia statute was announced in *Hartman vs. Greenhow*, 102 U. S., 672, Mr. Justice Field declaring at page 684:

> "Surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power: it undertakes to impose upon one the burden which should fall, if at all, upon another."

A remedy over for the whole tax is not equivalent to immunity from taxation; yet this Act does not even pretend to give a remedy for more than a part of the tax.

The contention cannot seriously be made, and doubtless will not be made, that the amounts receivable by Mrs. Frick and Miss Frick as insurance under policies taken out by Mr. Frick upon his own life formed a part of the estate of Mr. Frick. The most that can be said in favor of the tax here in question is that it is a tax upon the amounts received by Mrs. Frick and Miss Frick, and that the executors, though neither the

estate in their hands nor they themselves benefited in any way by the receipt of these moneys, are made the collectors of the tax for the United States. If the executors had no recourse against the beneficiaries of the policies for the tax paid on the amount of their proceeds, the tax would be plainly bad. There must be some basis for taxation. Normally it is found in the protection accorded by the taxing power to the subject of the tax. The subject can be taxed differently from others only when he belongs to a class which may be differentiated from those others, or owns something which those others do not own, or does something which those others do not do, or benefits by something by which those others do not benefit. The executors and the estate of Mr. Frick cannot be distinguished from other executors and estates by reason of the policies of insurance not payable to them which are here involved, which they do not own, with reference to which they did nothing and could do nothing, and by which they did not in any way benefit. The question narrows, therefore, to this: Can they constitutionally be made the collectors of a tax on amounts received by others, and, if so, upon what conditions?

We do not contend that the United States could not make the executors tax collectors in some cases. It could doubtless make them collectors of taxes upon property in their hands, even if they were not the owners of the property:

Carstairs vs. Cochran, 193 U. S., 10. But here the proceeds of the policies never were in their hands and never could be got into their hands. The contracts of insurance, both in their inception and in their performance, were, so far as the executors were concerned, *res inter alios actae.*

A person having no property of another in his hands cannot be made liable to a tax upon the property of that other or upon a transaction by which that other alone benefits. The levying of such a tax will not be justified by giving the person made liable to pay it a right of action for recoupment against the person who owns the property or is benefited by the transaction upon which the tax is based. How much the executors would get for their pains in an action against the beneficiaries in a foreign state is made clear by *Colorado vs. Harbeck,* 232 N. Y., 71. Such a right of action over is not the equivalent of immunity from taxation, and to select as the payer of a tax one who has no relation whatever to the thing or person taxed, exact from him that tax and give him in return nothing but a claim by means of which he may or may not make himself whole, is such an arbitrary and unjust discrimination against him alone of all members of the general public that we submit it cannot be sustained. If Congress should so act against any person, it would plainly deprive him of his prop-

erty without due process of law in violation of the Fifth Amendment of the Federal Constitution. See *United States vs. Baltimore & Ohio R. R. Co.*, 84 U. S., 322, *supra.*

But how much more clearly obnoxious to the constitutional provision is the tax involved in this case! The property upon which the tax is based is not a part of the estate. It is not in the hands of the executors. Neither the estate nor the executors have anything to do with it. They could not help the beneficiaries to get it. They could not prevent the beneficiaries from getting it. They are as negligible in the payment of the amounts of life insurance as if Mr. Frick had left no estate at all and had neither an executor nor an administrator. And yet the Government is attempting under the Revenue Act to impose upon them a liability because of the insurance moneys received by Mrs. Frick and Miss Frick, and is giving them and the estate in return not even a right to be made whole. For, as we have shown, the executors have been compelled by reason of the addition of the amounts of the insurance moneys to the value of the estate in their hands to pay an additional tax of $108,000, and they are entitled under the provisions of the Act to recover from the beneficiaries of the policies no more than $96,000. Surely this is the very refinement of deprivation of property without due process of law.

That a tax burden rightfully to be borne by the beneficiaries of the policies taxed should be imposed on the executors of the insured in the first instance, is too serious a defect in the statute to permit its being held constitutional. That the attempt of Congress to make that injustice less obvious is abortive, and does not save the estate of the insured from being in some instances completely wiped out by the insurance tax, is abundantly clear. But the fundamental iniquity of this statute lies even deeper than that. The ostensibly uniform rule of Section 408, by which the extent of the executors' right of reimbursement is fixed, leads to the most arbitrary and irrational results when applied to net estates of different sizes, the total proceeds of insurance policies being kept constant. The Court is earnestly requested to examine a tabulation of these results, printed at page 55 a of the appendix to this brief, which shows that the proportion of the insurance tax recoverable by the executors under given conditions is governed not by any consistent rule of policy, logic or convenience, but by the sheerest caprice.

What legislative policy there may be behind requiring beneficiaries to pay a graduated tax, *determined by the value of a stranger's property*, on the proceeds of their own insurance policies, it is difficult to perceive. Why, from the viewpoint

of the executors, the beneficiaries should have to bear only a proportion of that tax, the rest being saddled on the estate, it is even more difficult to understand. But why that proportion should *decrease* from 99.94 per cent. of the tax where the insured left a very small taxable estate to 71.9 per cent. where that estate is $1,000,000, thereafter fluctuate between 65.23 per cent. and 77.8 per cent., for no assignable reason, until the net taxable estate amounts to $10,000,000, and thereafter *increase* again by slow degrees to 98.37 per cent. where the net taxable estate of the insured is $200,000,000, is beyond comprehension. A tax burden falling so unequally on different estates can not constitutionally be imposed. It is "only and simply arbitrary, based upon no real distinction and entirely unnatural." See *Nicol vs. Ames*, 173 U. S., 509, 521.

It is submitted, therefore, that, even if the beneficiaries under the policies might have been made liable by Congress to a tax upon the amounts received by them, there is no justification whatever for the levying of such a tax upon the executors or the estate of the deceased; and the assurance given to them that they shall not ultimately bear the tax is so uncertain and inadequate as to all of the tax and so entirely lacking as to a part of the tax that the whole tax on the insurance moneys falls under the ban of the supreme law. No construction of the statute is possible which will sustain the tax as it has been lev-

ied by Congress. Nor is any construction of the statute possible which will separate a part of the tax from the rest and so save a brand from the burning. It cannot be said that Congress did not mean to tax the estate in the hands of Mr. Frick's executors on insurance moneys received by others and to tax it on those moneys at the highest rate prescribed by the law. No intent to tax it at a less rate can conceivably be figured out of the statute. It is equally plain that Congress did not mean that the estate should be recompensed by the beneficiaries of the policies for the amount so paid to the Government. They were given the benefit of an average of the various rates paid on different portions of the estate of which their insurance moneys formed no part. It is a preposterous proposition, but we are compelled to say that we believe that Congress actually regarded these insurance moneys as really being a part of the estate and not merely an adventitious circumstance which might be seized upon with a view to increasing the tax upon the estate; and under this fundamental misapprehension of the property rights of the parties concerned, it has tried to make one man pay another man's tax.

The deprivation of property without due process of law will be no plainer than in the case at bar, but the extreme injustice which will be done by sustaining the tax will perhaps be more

clearly brought out by a supposititious case. A. dies leaving his entire estate of a net value of $2,000,000 to B. Before his death policies of insurance upon his life payable to C. had been issued in the amount of $10,000,000. Except for the issuance of these policies of insurance, under the Revenue Act of 1918 the estate payable to B. would have been taxed at the following rates:

1%	of $ 50,000	$ 500
2%	of 100,000	2,000
3%	of 100,000	3,000
4%	of 200,000	8,000
6%	of 300,000	18,000
8%	of 250,000	20,000
10%	of 500,000	50,000
12%	of 450,000	54,000
		$155,500

If, however, the amounts of the policies may be included in determining the net value of the estate payable to B., the tax so calculated will be increased by the following amounts:

14%	of $1,000,000	$ 140,000
16%	of 1,000,000	160,000
18%	of 1,000,000	180,000
20%	of 3,000,000	600,000
22%	of 2,000,000	440,000
25%	of 2,000,000	500,000
		$2,020,000

The total tax on this hypothesis will be $155,500 plus $2,020,000, or $2,175,500. While the increase

in the tax ultimately falling upon B. by reason of the insurance policies in which he is not concerned will be $2,020,000, the amount which the executors or administrators are allowed to recover on his behalf from C. will be only five-sixths of $2,175,500, or $1,812,918.33. The sole beneficiary of an estate of equal size with that payable to B., where there were no contracts of insurance of the decedent's life, would pay a tax of $155,500, but even if the executors were able to recover from the beneficiaries, the estate eventually payable to B. in the case supposed would pay a tax of $2,175,500, minus $1,812,918.33, or $362,581.67. Because of something which concerned in no way the estate payable to B., that estate would be taxed, even if C. were solvent and should pay to the estate all that the law required of him, much more than twice as heavily as an estate of equal size where no outsider could be found who had any claims under policies of insurance on the life of the decedent. Initially, however, the executors must go out and raise and pay into the coffers of the United States $155,500 more than the total value of the estate. Just how such a transaction is to be financed is beyond our comprehension. And to take the extreme case where the net estate payable to B. amounts to only $50,000 and would not be taxed at all if the decedent had made no contracts of insurance on his own life, in a case where he had done so the whole estate so payable

would be wiped out, and B. would get nothing but a claim for the recovery of a part of the amount otherwise payable to him.

One man cannot, under our constitutional system, be made to pay another's tax any more than he can be made to pay another's debt, and we submit that the plaintiffs are entitled to recover the amount in suit of which they have been deprived without due process of law.

In *Hartman vs. Greenhow,* 102 U. S., 672, the question was as to the validity of a statute requiring a tax on bonds to be deducted from coupons payable to bearer which had been originally attached to them but had later been separated and were held by a different owner. The court, speaking unanimously by Mr. Justice Field, said (p. 684): "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power: it undertakes to impose upon one the burden which should fall, if at all, upon another." If it is not legitimate to require the holder of a coupon to pay the tax levied upon a bond with which it once at least was connected, it surely is not legitimate to require the holder of an estate to pay the tax upon property which never had any connection whatever with the estate.

POINT V.

Congress clearly intended that the major part of this tax should ultimately be imposed upon the beneficiaries of the policies. Such imposition is illegal.

This resolves itself into two principal propositions:

(1) That if the tax can be regarded as an excise tax, it is illegal because the classification is bad; and

(2) That this is not an excise tax at all, but is a direct tax and is bad because not apportioned.

It was clearly the intent of Congress that the major part of this tax should be imposed upon the beneficiaries of the policies. Such imposition is illegal,—

(1) Because if the tax can be regarded as an excise tax the classification is bad. It undertakes to determine the amount of the tax not by the value of the thing taxed, to wit, \$434,629.52, but by that value plus approximately \$28,000,000. (See this brief, p. 13.)

If this be a property tax, it is beyond question unconstitutional because it was not appor-

tioned. If it is an excise tax, it is unconstitutional because it is discriminatory and unequal, as we shall now proceed to show.

The amount of the tax sought to be imposed in this case depends not upon the amount of any one policy or the total amount of all the policies held by Mrs. Frick, or the total amount of all the policies held by Miss Frick, regarded as separate units, or even upon the total amount of all the policies held by both of them, but upon the taxable value of all the policies plus the taxable value of the dead man's estate. For example, the same person may own two $10,000 policies, one on the life of A. and one on the life of B. There may be no tax on the policy on the life of A., because he dies insolvent or because his estate is less than $50,000. On the other hand there may be a tax of $2,500 on the policy on the life of B., because he dies worth $10,000,000. Considered as a tax imposed on the beneficiaries, one of its inherent vices is that Mrs. Frick and Miss Frick are required to pay a tax which is graduated, and which varies not according to the value of their property but according to the value of their property plus the value of the entire taxable estate of the decedent. In other words, while the tax upon what Mrs. Frick receives would be $3,100, and the tax upon what Miss Frick receives would be $4,090 at the rate specified in Section

401 of the statute, a total of $7,190, in point of fact they have been taxed $96,234.10; that is to say, instead of being taxed nothing on the first $50,000, 1 per cent. on the second $50,000, 2 per cent. on the next $100,000, and 3 per cent. on the next $100,000, they have been taxed 20 per cent., as it turns out, on the whole.

More than that, as already shown (page 68), the percentage of the total insurance tax to be borne under the statute by holders of policies of equal value on lives of different men, fluctuates from 65 per cent. to 99 per cent., and that on no conceivable ground of policy.

This is not an admissible method of classification; it is not a legal way to levy an *ad valorem tax*, as has been shown. (This brief, p. 55 ff.) Here, however, there are additional reasons for its invalidity. These are well stated by the late Chief Justice in *Knowlton vs. Moore*, 178 U. S., 41. Mr. Justice White says first, speaking of the construction of the War Revenue Act of 1898 (30 Stat., 448), p. 76:

> "But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A., which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred-fold

> the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent., and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent., and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other."

Again, speaking of the general proposition of the power of Congress, he says (p. 77):

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no

occasion for doing so exists, since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below."

The question raised by Mr. Justice White in the excerpt last quoted is so plainly to be answered in favor of the taxpayer, that no State legacy tax is at the present time imposed, the rate of which is determined by considering the value of the estate of the decedent to whose title the taxpayer succeeds, and in those cases under State laws in which the constitutional validity of such an arbitrary imposition has been raised, the taxing act has been held to be unconstitutional.

In *Black vs. State,* 113 Wis., 205, an inheritance tax imposed on beneficiaries or distributees of estates exceeding ten thousand dollars in value only, the tax being levied without regard to the amount received by the individual beneficiary, was held to be unconstitutional, as being an arbitrary and unlawful discrimination between beneficiaries of the same class, under the State constitution, and the Fourteenth Amendment.

In *State of Ohio vs. Ferris,* 53 Oh. St., 314, an inheritance tax act taxing the whole right of receiving or succeeding to shares of estates exceeding twenty thousand dollars in value, the tax being imposed at a higher rate percentum on the

right to succeed to shares of estates of larger value than to shares of estates of smaller value, was held to be in conflict with the Bill of Rights of the State of Ohio, which declared that "government is instituted for their (the people's) equal protection and benefit."

The suggestion that these cases are distinguishable as turning on the equal protection clause or its equivalent, is more than met by the language of Mr. Justice Field in *United States vs. Singer,* 15 Wall., 111. In that case, the federal excise tax on distilleries, measured by capacity rather than by actual output, was justified in the following language:

> "The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. *The law does not establish one rule for one distillery and a different rule for another, but the same rule for all alike.*"

The present tax on insurance policies imposes one rule for one beneficiary, and a different rule for another, since the rate of tax varies not with the amount of the proceeds of the policy, but with the value of a totally unrelated body of property, namely that owned at his death by the person upon whose life the policy happened to be taken out, and also with the disposition of his property made by that person in his will.

(2) This tax, however, is not an excise tax, but is a direct property tax, and is bad because it is not apportioned.

The question here is a fundamental one, and there can be no doubt about the law. If what Congress did here was to impose a tax upon property, then the tax is bad, whether imposed directly or indirectly.

We may take as leading decisions upon this point the two cases of *Pollock vs. Farmers' Loan & Trust Company*, 158 U. S., 601, in which it was held that the tax upon income derived from real estate and from personal property is a tax which must be apportioned because it is in effect a tax upon real and personal property, and *Flint vs. Stone Tracy Company*, 220 U. S., 107, in which it was held that a tax upon the privilege of doing business in a corporate capacity is not a property tax, but an excise tax.

It would be altogether beyond bounds to attempt within the limits of this brief to discuss in detail the lengthy and exhaustive opinions filed by the various justices in *Pollock vs. Farmers Loan & Trust Company*, but we think the proposition may safely be deduced from that case and from *Flint vs. Stone Tracy Company* and the many other decisions of this Court referred to

in those opinions, that the tax imposed in this case being in reality a tax imposed upon property (contracts) which belonged to Mrs. Frick and Miss Frick, under the terms of which 20 per cent. of the value of their property was taken away from them on the day on which, under the terms of those contracts, it became the duty of the insurance companies to pay the money, is in fact the imposition of a capital tax of 20 per cent. upon their property (that being the rate at which the proceeds are diminished *in this case* by the executors' right of reimbursement).

We think it may be correctly asserted that the question upon which this court divided in *Pollock vs. Farmers Loan & Trust Company* is clear, and that the proposition upon which the minority dissented, even if one could conceive that the question was open and not definitely closed by the decision of the majority, would have no bearing upon the question which we have in this case.

As we understand that case the court was unanimous upon the proposition that if the income tax was in fact a tax upon either real or personal property, it was a direct tax which must be apportioned among the states. The court was also unanimous that Congress could not do indirectly what it could not do directly. The majority of the

Court thought and decided that the income tax which was imposed on the usufruct of real or personal property was in fact a tax upon the property, and that as the property could not be taxed, the usufruct could not be taxed either. The ground upon which the minority dissented was that a man's entire income from all sources, real estate, personal property, personal services, etc., mingled together as one subject of taxation, is a distinct and different thing from his real estate or his personal property. Considerable stress was laid, for example, on the proposition that a large part of the real estate in the United States was productive of no income and therefore was not in any way affected by an income tax.

Congress and the people of the United States have acquiesced in the validity of the decision of this Court. When Congress and the people of the United States amended the Constitution, they did not desire to do anything except to provide that one particular and only one direct tax, to wit, the income tax, need not be apportioned among the states. They did not say that it was not a direct tax; they said that although it was a direct tax it need not be apportioned. Everything that could be said about what is a direct tax and what is not a direct tax is said exhaustively in the arguments of counsel and the

opinions of the judges in the *Pollock Case*. In the thirty years, however, which have elapsed since that case was decided, the subject has been referred to and, we think, re-established in a number of cases.

It is not necessary for us in this case to attempt to frame a comprehensive definition of what the people of the United States understood the word "direct" to mean when used in connection with taxes. One does not get anywhere by going to the dictionary and undertaking to find out what is meant by "direct" and "indirect." We know that *direct* means straight, and *indirect* means crooked. We know that the framers of the Constitution had no clear idea themselves what the word "direct" meant as descriptive of a tax: See Mr. Seward's argument in *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S., 429, particularly at the bottom of page 463 and top of page 464, and Mr. Chief Justice Chase's opinion in *Veazie Bank vs. Fenno*, 8 Wall., 533, 544. We know, however, that the principal grievance of the American people at that time was that they were taxed without representation, and that they definitely adopted the principle in the Constitution that taxation should be controlled by representation and representation by population. They had the dominant idea that taxation should be ap-

portioned according to population. At the same time, recognizing certain evils which were necessarily connected with taxation, just as our present Secretary of the Treasury and our present Congress still do, they prohibited any taxes upon exports; and realizing that duties upon imports and things of that kind could not be apportioned, they imposed upon Congress as to such taxes the criterion of uniformity instead of apportionment.

The courts have tried again and again to determine as best they might what the people of the United States meant by a direct tax, and we suggest that the question still remains in the same state as the word "fraud" or the words "due process of law." Wisely the courts have left the question of what is a fraud to be determined by the facts of the particular case, unhampered by definitions. Wisely they have left the question of what is due process of law undefined,—an undefinable but real thing, which every Anglo-Saxon knows is a guaranty of protection to the people,—a need which changes from age to age and must not be hampered by definition. What we mean today by due process of law is quite another thing from what our ancestors meant by it in the Petition of Right in 1628. There are such an infinite number of new

things arising from year to year in the development of the United States, which are the subject of tax, such an infinite number of new taxes being devised from year to year by economists in and out of Congress, that an attempt to define once for all the word "direct" in connection with the word "taxes" would be in effect to modify the Constitution.

One can, of course, obtain real help from the decisions of the courts and the language used by judges, which were intended perhaps not to be definitions but to explain why one thing was included and another excluded from the rule of apportionment.

Thus, in *Brushaber vs. Union Pacific Railroad*, 240 U. S., 1, Mr. Chief Justice White said, middle of page 15, that excise taxes "were not taxes directly on property because of its ownership." He said again, middle of page 16, that the Court in the *Pollock Case* did not question "at all that in common understanding it was direct merely on income and only indirect on property"; and that "it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived,

and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent." In *Towne vs. Eisner*, 245 U. S., 418, Mr. Hughes in his argument distinguished direct taxes from excise taxes upon the ground that excise taxes were imposed on "gains and profits from business, privileges, employments and vocations" and that taxes on real or personal property, or income derived therefrom, because of its ownership, were direct taxes.

We shall try, however, to describe a direct tax in terms applicable to the instant case.

A direct tax is a tax imposed upon persons or upon property as such. By way of contrast, a tax upon a privilege is an excise tax. A tax upon the occurrence of an event which results in the creation of a right in a person which he did not previously have is ordinarily not a direct tax. Even if a property right is presupposed, a tax upon the occurrence of an event with reference to the thing which is the subject of the property right may be an excise tax. But if the event taxed is one without which the property in the thing would be of no use, in substance the tax is upon the property itself and is therefore a direct tax. Thus a tax upon the income from property is a direct tax because without income the property is valueless. A tax upon the re-

ceipt of something in accordance with a pre-existing right to receive it is a tax upon the only thing which gives that pre-existing right any value, and it is therefore a direct tax. Hence, a tax upon the amount receivable by beneficiaries under life insurance policies is a direct tax.

This definition, which we consider applicable to the facts of this case, is the doctrine of *Pollock vs. Farmers Loan & Trust Company.* Indeed, if the same postulate is made as in that case (namely, that a tax upon property is a direct tax), it is even more plain that a tax upon the receipt of the principal of one's property is a direct tax than to see that a tax upon the receipt of the income therefrom is a direct tax. Our definition distinguishes *Hylton vs. United States* and *Springer vs. United States.* It distinguishes *Veazie Bank vs. Fenno.* It distinguishes *Knowlton vs. Moore* on the ground that the tax there was upon the creation of a new property right. It distinguishes *Thomas vs. United States,* and all the so-called stamp tax cases as being excises on the creation of a new right (see appendix to this brief, page 64 a). It distinguishes *Flint vs. Stone Tracy Company* on the ground that the tax there was upon the doing of business—all of a corporation's income has a sufficient relation to its business to be a proper measure of a tax thereon.

Finally, let us look for a moment at what this particular tax is.

Let us first see what it is not. It is not a tax imposed upon the making of a contract or with respect to the vellum, parchment, or paper upon which the contract is written. It is not a tax imposed upon the right of the insurance company to do business; it is not a tax imposed upon any right or privilege conferred by the state; it is not a tax imposed upon the happening of an event in the sense in which the word event is used with reference to excise taxes.

It is in fact a tax imposed upon property, to wit, a contract. The so-called event is nothing but the happening of the date upon which a contractual obligation matures. It is just the same as the happening of a date upon which a promissory note or a mortgage falls due; the happening of a date upon which an owner agrees to pay a contractor for building a house; the date upon which a man who has sold his house is to receive the purchase money. It would scarcely be contended that the United States could levy a tax by which it took 20 per cent. of the principal of a promissory note or of a mortgage or of the money which was to be paid a contractor for building a house, or which the owner received

when he sold a piece of real estate, and escape the necessity of apportionment by calling it an excise tax upon the event. Why? Because what is done here is, in reality and in its essence, taking away from a person by a tax of 20 per cent. of his property, and therefore it is necessarily and fundamentally a direct property tax. If the levy of a tax upon the income derived from real estate or the interest falling due upon a corporate bond is a direct tax upon the real estate and upon the bond, as the *Pollock Case* decides, we submit that more surely is the levying of a tax of 20 per cent. upon the *value* of the real estate or of the principal of the bond or of the contract of insurance a direct tax upon property.

POINT VI.

Reply to Brief of Plaintiff in Error

1. We do not find any reference in the Government's brief to our contention that the provisions of Section 402 (f) cannot be construed to be retroactive. We do not know whether this omission is due to the fact that the Government considers the argument unanswerable, or because it thinks it is frivolous and unworthy of consideration. But the fact is, the point was raised in the court below (see Record, folio 20, page 12); it was elaborately briefed and thoroughly argued by counsel on both sides; and, as we understand it, the only reason why Judge Thomson omitted to discuss the point in his opinion is that he was so thoroughly convinced of the unconstitutionality of the tax that he deemed it unnecessary to discuss construction.

2. All the points raised and discussed in the Government's brief revolve around the single notion that there is such a relationship between the proceeds of a policy of insurance on a man's life and the estate of which he dies possessed as to justify Congress in adding policies of life insurance which belonged to others to the amount of

his estate in determining a basis for taxing his estate. We think we have demonstrated that this argument is unsound. It is true that in *Flint vs. Stone Tracy Co.* and *Maxwell vs. Bugbee* it was held, in the one case, that in order to ascertain the amount of the excise tax imposed upon a corporation, the income of that corporation other than that derived strictly from its business operations might be included with its other income in the valuation; and that, in the other case, the court held that for the purpose of ascertaining the rate of inheritance tax on property in New Jersey, the State of New Jersey could consider the amount of the decedent's whole estate, wherever located. It is immediately apparent that these and like cases only involve the question of whether the value of the taxable citizen's own property is to be considered. They are no authority whatever for the proposition that in getting at the taxable value of his property one can add to it some other person's property or the value of all the property which he ever owned or conveyed.

A further discussion of the cases cited by the Government on this point will be found in the appendix to this brief, at page 66 a, ff.

3. The Government seems to contend that it is immaterial in this case whether Congress in-

tended to impose any personal liability upon Mrs. Frick and Miss Frick or any lien upon their property for the payment of the whole or a part of this tax. Indeed, one may fairly infer from its brief that the Government does not really believe that the whole or any part of this tax can constitutionally be recovered either by the executors or by the Government from Mrs. Frick and Miss Frick.

Its argument ignores entirely the intent of Congress as written all over these sections. Congress never intended this tax to fall upon anybody except the owners of the policies. This intention failed to be accomplished because the act as drafted does leave a variable portion of the tax to be borne by the estate. It is a curious proposition for the Government to advance to say that if the intent of Congress cannot be carried out by the imposition of this tax upon the beneficiaries, the tax shall be imposed altogether upon the estate, when it is perfectly clear that Congress did not intend the whole tax to fall upon the estate. We have already shown that the language of the Act which does impose a portion of the tax upon the estate was simply a blunder of the draftsman. It is clear that Congress intended the executors to be nothing more than tax collectors; and it is equally clear under the

decisions of this Court (*e. g. United States vs. Baltimore & Ohio R. R. Co.*, 84 U. S., 322) that the "tax collector" necessarily has the right to raise the objection that the owner is not taxable, because otherwise the collector and not the owner would be required to bear the tax. For this reason, objections taken on behalf of the beneficiaries are not to be dismissed with the remark that the beneficiaries are not parties to this suit.

It also appears from these cases, as is shown by the language of Mr. Justice Hunt at page 327 in the case cited, that where the collector is given a right over against the owner of the property taxed, the tax imposed "is in substance and in law a tax upon the income of the creditor or stockholder and not a tax upon the corporation," that is, upon the collector.

4. The Government builds quite an argument, beginning on page 54 of its brief, upon a supposed confusion in the mind of the court below, based upon the thought that that court was talking about proportions of the insurance tax instead of portions of the total tax.

A reference to Judge Thomson's opinion (Record, end of folio 129, page 32) shows that the court below did not misunderstand the statute, but that the Government misunderstands the

court. Besides this, if we know anything about arithmetic, the calculation suggested by the Government based upon the alleged difference between "portion" and "proportion" would produce no difference in the figures and results. It starts at the same place, goes the same route, and reaches the same conclusion, at which we start, over which we go, and at which we arrive in the calculations set forth in our brief. See pages 4 and 10 of this brief, and particularly the appendix to this brief at page 52 a, ff., where the calculation will be found at length.

5. Quite naturally the Government refers to certain bankruptcy cases. It will be observed that it relies not so much upon the points decided as upon language used in the opinions by some of the judges. If one turns to the Bankruptcy Act for light upon the question in the instant case, one must bear in mind (1) that Congress has plenary power under the Constitution over bankruptcies, unhampered in any way; (2) that the cases under the Bankruptcy Act have been largely confined to questions of construction of its language; (3) that the construction of the statute, has, in most instances, involved the construction of state constitutions and laws relating to the exemption of insurance policies from liability for debts; and (4) that the decisions are

in such confusion that they tend to obscure rather than to clarify the question involved in this case.

6. The case of *Will of Allis,* 174 Wis., 527, on which the Government relies as controlling the constitutional points in this case (page 29), turns on the peculiar Wisconsin doctrine that the insured may cut off beneficiaries without their consent. This doctrine is not followed in any other jurisdiction. See appendix to this brief, page 71 a.

Some of the other cases relied on by the Government are distinguished in their order of appearance in the appendix to this brief at page 66 a, ff.

7. The point is raised by the Government as to the so-called "savings" features of life insurance. The argument seems to be that if a man pays premiums on life insurance policies for the benefit of his family, he will have less money left when he dies to become the subject of an inheritance tax than if he had not taken out the insurance, and that therefore on some sort of reasoning there is a sufficient connection between policies and savings deposits to justify a tax on the policies. The fact is that what he would have done with the money if he had not spent it on in-

surance, lies purely in the realm of conjecture, and affords no basis whatever for a theory of taxation. We think that the ordinary citizen would have spent the money in more luxurious or perhaps even riotous living. To come down to the instant case, we know perfectly well what Mr. Frick would have done. He would have given the money to charity. If his estate had been larger at the time of his death by the amount of the insurance premiums, the increment would have passed to the residuary legatees, 87 per cent. of whom are charities and non-taxable.

The real difficulty with the Government's conjecture, however, is that pointed out by Judge Thomson (Record, folio 131, page 33). This assessment was not made under paragraph (c), based upon the amount of the premiums, on the theory that they were gifts made in contemplation of death. No attempt was made by the Department of Internal Revenue to travel that way, because section 402 (c) (Appendix to this brief, page 3 a) says: "Any transfer of *a material part* of his property * * *." No one would ever imagine that insurance premiums amounting to $261,046.32, paid in annual installments over a period of forty years, were a material part of the estate of a man who was worth $100,000,000 at his death.

CONCLUSION.

We feel that we could have rested this case safely upon the opinion of the Court below, by Judge W. H. S. Thomson, which is found in the Record, beginning at page 29. It is only the large amount of money involved, which must be borne in its last analysis, either in whole or in part, by charitable institutions, which constitute 87 per cent. in amount of the residuary estate under Mr. Frick's will, and the great importance of the constitutional questions involved, that have impelled us to burden this Court with a perhaps unduly elaborate brief on all the questions involved.

These questions were thoroughly argued before Judge Thomson, and after a careful study of the case it seemed so clear to him that the provisions in the statute upon which the assessment was founded were so plainly and clearly unconstitutional that it was not necessary for him to discuss or even refer to all the points which were raised before him and are here raised. Judge Thomson states his conclusion thus (Record, bottom page 36):

> "Here, the statute arbitrarily makes something a part of the Frick estate which in fact was no part of it, and upon the value of that undertakes to levy an estate tax, an

> *ad valorem* transfer excise tax, amounting to 25 per cent. of the value. This, in my judgment, is the taking of property without due process of law, the levying of a direct tax without apportionment as required by the Constitution."

Just so, to our minds this statute is so palpably unconstitutional that this Court should affirm the judgment of the Court below on the grounds stated by Judge Thomson.

Respectfully submitted,

George B. Gordon,
John G. Buchanan,
Miles H. England,
S. G. Nolin.

Supreme Court of the United States

NO. 681 OCTOBER TERM, 1924.

C. G. LEWELLYN, Formerly Collector of United States Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error,

vs.

ADELAIDE H. C. FRICK, HELEN C. FRICK, CHILDS FRICK, HENRY C. McELDOWNEY and WILLIAM WATSON SMITH, Executors of the Last Will of Henry C. Frick.

In Error to the District Court of the United States for the Western District of Pennsylvania.

APPENDIX TO BRIEF FOR DEFENDANTS IN ERROR.

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INDEX TO APPENDIX.

	PAGE
Table of authorities	ii
Copy of Act under which tax was levied	1 a
Abstracts of insurance policies classified	12 a
Assignments of policies	20 a
Copy of Equitable Life Policy No. 164814	23 a
Life insurance exemption laws:	
Connecticut	27 a
Massachusetts	28 a
New Jersey	29 a
New York	29 a
Pennsylvania	31 a
Regulations 37, Article 32	35 a
Quotation from Coke upon Littleton	36 a
Change in statutory language as affecting construction	37 a
Tax laws are strictly construed	41 a
Statutes are construed so as to avoid unconstitutionality	44 a
An excise tax on a completed property transfer is Unconstitutional	46 a
Computations of proportions of tax borne by estate and beneficiaries of policies	52 a
Retroactive excise taxes are direct taxes	58 a
The Stamp Tax Cases	64 a
Cases relied on in brief for Plaintiff in Error	66 a
Judge Dickinson's opinion in *Girard Trust Co. vs. McCaughn*	72 a
Judge Brewster's opinion in *Coolidge vs. Nichols*	83 a

TABLE OF AUTHORITIES.

Statutes Printed in Appendix.

PAGE

Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057:
- Section 401, *Id.* 1096 .... 1 a
- Section 402, *Id.* 1097 .... 3 a
- Section 403, *Id.* 1098 .... 5 a
- Section 408, *Id.* 1100 .... 9 a

Life Insurance Exemption Laws
- Connecticut .... 27 a
- Massachusetts .... 28 a
- New Jersey .... 29 a
- New York .... 29 a
- Pennsylvania .... 31 a

Other Authorities

Regulations 37, Article 32 .... 35 a
Coke Upon Littleton, 214-b .... 36 a
Dickinson J.'s opinion in *Girard Trust Company vs. McCaughn* .... 72 a
Brewster J.'s opinion in *Coolidge vs. Nichols* .... 83 a

Cases.

(Reference to pages of the appendix to this brief are numbered 1 a, 2 a, etc.)

Addy Co. vs. United States, 264 U. S., 239 .... 45 a
Air-Way Corporation vs. Day, 266 U. S., 71 59
Anderson's Estate, 85 Pa., 202 24
Allis, Will of., 174 Wis., 527 .... 71 a
Bennett vs. Robinson, 10 Watts, 348 29
Benziger vs. United States, 192 U. S., 38 .... 43 a
Billings vs. United States, 232 U. S., 361 .... 71 a
Black vs. State, 113 Wis., 205 78
Brown vs. United States, 298 Fed., 177 .... 44 a
Brushaber vs. Union Pacific R. R. Co., 240 U. S., 1 .... 51, 69 a, 70 a, 85
Bullen vs. Wisconsin, 240 U. S., 625 .... 67 a

PAGE
Carnegie, Andrew, Matter of, 203 App. Div., 91....24, 28
Carroll vs. Greenwich Insurance Co., 199 U. S., 401 48 a
Carbon Steel Co. vs. Lewellyn, 251 U. S., 501........... 70 a
Carstairs vs. Cochran, 193 U. S., 10........................ 66
Chanler vs. Kelsey, 205 U. S., 466........................ 59
Child Labor Tax Case, 259 U. S., 20........................ 52
Choate vs. Trapp, 224 U. S., 655........................ 47 a
Colorado vs. Harbeck, 232 N. Y., 71........................ 66
Commonwealth vs. Wellford, 114 Va., 372, 76 S. E. 917 .... 50 a
Coolidge vs. Nichols, Collector (not reported)....51 a, 83 a
Cooper vs. Pogue, 92 Pa., 254........................ 29
Dawson vs. Kentucky Distilleries Co., 255 U. S., 288 .... 50, 60 a
Delaware, Lackawanna & Western R. R. Co. vs. Penn'a., 198 U. S., 341........................ 59
Dolan's Estate, 279 Pa., 582........................28, 30
Douglas vs. Edwards, 298 Fed., 229........................ 40 a
Edwards vs. Slocum, 264 U. S., 61........................ 57
Eidman vs. Martinez, 184 U. S., 578........................42 a, 44
Eisner vs. Macomber, 252 U. S., 189........................ 50, 61 a
Elliott's Appeal, 50 Pa., 75........................ 24
Empire Fuel Co. vs. Hays, 295 Fed., 704........................ 44 a
Flint vs. Stone Tracy Co., 220 U. S., 107........................ ....49, 58 a, 66 a, 80, 87
Girard Trust Co. vs. McCaughn (not reported)....30, 72 a
Gould vs. Gould, 245 U. S., 151........................42a, 44
Greiner vs. Lewellyn, 258 U. S., 384........................ 67 a
Hartman vs. Greenhow, 102 U. S., 672........................64, 73
Hill vs. Wallace, 259 U. S., 44........................ 52
Holden vs. Insurance Co., 77 So. Carolina, 299........ 24
Hooper vs. California, 155 U. S., 684........................ 45 a
Howat vs. Kansas, 258 U. S., 181........................ 45 a
Hunt vs. Wicht, 174 Calif., 205, 162 Pac., 639........... 49 a
Hylton vs. United States, 3 Dall., 171........................70 a, 87
Irvine vs. Sibbetts, 26 Pa., 477........................ 29
Irwin vs. Gavit, 295 Fed., 84........................ 39 a
Jones vs. Clifton, 101 U. S., 225........................ 28
Keeney vs. New York, 222 U. S., 525........................ 69 a
Kissam vs. McElligott, 280 Fed., 212........................ 40
Knights Templars' Indemnity Co. vs. Jarman, 187 U. S., 197........................ 45 a

PAGE

Knowlton vs. Moore, 178 U. S., 41 .... 57, 58, 62, 76, 87
Knox vs. McElligott, 258 U. S., 546 .... 35, 40, 41, 46
Lacey vs. State Treasurer, 152 Iowa, 477 .... 50 a
Levy vs. Wardell, 258 U. S., 542 .... 35, 38, 41
Lloyd vs. Royal Union Mutual Life Ins. Co., 245 Fed., 162 24
Loan Association vs. Topeka, 87 U. S., 655 63
Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S., 467 .... 39 a
Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283 .... 68 a
Maxwell vs. Bugbee, 250 U. S., 525 .... 56 a
Miller—Matter of, 236 N. Y., 290 .... 28, 30
Monroe Cider Vinegar & Fruit Co. vs. Riordan, 280 Fed., 624 .... 40 a
McArthur vs. Scott, 113 U. S., 340 29
McCray vs. United States, 195 U. S., 27 .... 46 a, 69 a
Neary vs. Metropolitan Life Ins. Co., 103 Atl. Rep., 661 24
New York Trust Co. vs. Eisner, 256 U. S., 345 49
Nicol vs. Ames, 173 U. S., 509 .... 50, 63 a, 64 a, 65 a, 69
Orr vs. Gilman, 183 U. 278 .... 67 a
Panama Railroad Co. vs. Johnson, 264 U. S., 375 .... 45, 46 a
Parson's Estate—Matter of, 102 N. Y. Supp., 168 24
Patton vs. Brady, 184 U. S., 608 .... 49, 59 a, 70 a
Pell, In Re, 171 N. Y., 48 .... 48 a, 50, 52, 63 a
Plant vs. Walsh, 280 Fed., 722 .... 44 a
Pollock vs. Farmers Loan & Trust Co., 157 U. S., 429 .... 47 a, 50, 53, 60 a, 63 a, 83, 85, 87, 89
Pollock vs. Farmers Loan & Trust Co., 158 U. S., 601 .... 62 a, 80, 81
Presser vs. Illinois, 116 U. S., 252 .... 45 a
Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S., 18 58
Railroad Co. vs. Collector, 100 U. S., 595 .... 70 a
Rawson vs. Milwaukee Mutual Life Ins. Co., 115 Wis., 641 .... 71 a
Reynolds vs. McArthur, 2 Pet., 417 44
Scholey vs. Rew, 23 Wall., 331 .... 68 a
Shwab vs. Doyle, 258 U. S., 529 .... 35, 37, 37 a, 38, 41, 43, 44, 46

PAGE

Singer vs. United States, 15 Wall., 111 .... 49, 59 a
Smietanka vs. First Trust & Savings Bank, 257 U. S., 602 .... 38 a, 43
Southern Pacific Railroad Co. vs. Kentucky, 222 U. S., 63 59
Springer vs. United States, 102 U. S., 586 87
State of Ohio vs. Ferris, 53 Oh. St., 314 78
State vs. Probate Court, 102 Minn., 268 .... 50 a
Stockdale vs. Insurance Co., 20 Wall., 323 .... 70 a
Thomas vs. United States, 192 U. S., 363 .... 49, 58 a, 64 a, 65 a, 87
Thompson vs. Kreutzer, 112 Miss., 165 .... 61 a
Thompson vs. McLeod, 112 Miss., 383 .... 61 a
Towne vs. Eisner, 245 U. S., 418 86
Towne vs. McElligott, 274 Fed., 960 .... 48 a
Treat vs. White, 181 U. S., 264 .... 64 a, 65 a
Tyler, Administratrix, vs. Treasurer and Receiver General, 226 Mass., 306 20
Union Trust Co. vs. Wardell, 258 U. S., 537 .... 35, 38, 41
Union Refrigerator Transit Co. vs. Kentucky, 199 U. S., 194 .... 59, 62
United States vs. Baltimore & Ohio R. R. Co., 84 U. S., 322 .... 62, 67
United States vs. Field, 255 U. S., 257 .... 39a, 43
United States vs. Coulby, 258 Fed., 27 .... 44 a
United States vs. Delaware & Hudson Co., 213 U. S., 366 .... 45 a
United States vs. Isham, 17 Wall., 496 .... 43 a
United States vs. Merriam, 263 U. S., 179 .... 41 a, 44
United States vs. Perkins, 163 U. S., 625 .... 67 a
United States vs. Singer, 15 Wall., 111 .... 54, 69 a, 79
United States vs. Woodruff, 175 Fed., 776 .... 41 a
Veazie Bank vs. Fenno, 8 Wall., 533 .... 83, 87
Voorhees' Estate—In Re., 193 N. Y. Supp., 168 24
Wallace vs. Hines, 253 U. S., 66 59
Wardell vs. Blum, 276 Fed., 226 59
Washington Central Bank vs. Hume, 128 U. S., 195 25
Washington Water Power Co. vs. United States, 50 Ct. Cls., 76 .... 70 a
Wright vs. Blakeslee, 101 U. S., 174 .... 68 a
Y. M. C. A. vs. Davis, 264 U. S., 47 57

APPENDIX.

Copy of Act Under Which Tax Was Levied.

Act Feb. 24, 1919, c. 18 (40 Stat., 1057).

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,000;

6 per centum of the amount by which the net estate exceeds $450,000 and does not exceed $750,000;

8 per centum of the amount by which the net estate exceeds $750,000 and does not exceed $1,000,000;

10 per centum of the amount by which the net estate exceeds $1,000,000 and does not exceed $1,500,000;

12 per centum of the amount by which the net estate exceeds $1,500,000 and does not exceed $2,000,000;

14 per centum of the amount by which the net estate exceeds $2,000,000 and does not exceed $3,000,000;

16 per centum of the amount by which the net estate exceeds $3,000,000 and does not exceed $4,000,000;

18 per centum of the amount by which the net estate exceeds $4,000,000 and does not exceed $5,000,000

20 per centum of the amount by which the net estate exceeds $5,000,000 and does not exceed $8,000,000;

22 per centum of the amount by which the net estate exceeds $8,000,000 and does not exceed $10,000,000; and

25 per centum of the amount by which the net estate exceeds $10,000,000.

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the

extensions of fortifications, and for other purposes," approved March 3, 1917), or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.

Sec. 402. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time

created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable

by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. (40 Stat. 1097.)

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwrecks, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as

having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate

which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of sub-division (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia for exclusively public purposes, or to or for the use of any domestic corporation organized and

operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

No deduction shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under Section 404 the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a non-resident decedent, and the amount receivable as insurance upon the life of a non-resident decedent where the insurer is a domestic corporation, shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of sub-division (c) of Section 402, shall be deemed to be situated in the United States, if so situated either at the time of the trans-

fer or the creation of the trust, or at the time of the decedent's death.

In the case of any estate in respect to which the tax under existing law has been paid, if necessary to allow the benefit of the deduction under paragraph (3) of sub-division (a) or (b) the tax shall redetermined and any excess of tax paid shall be refunded to the executor. (40 Stat. 1098.)

* * * * * *

Sec. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of

the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. (40 Stat. 1100.)

Sec. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax lia-

bility of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth. (40 Stat. 1100.)

Abstracts of Insurance Policies Classified.

(a) ***Policies originally payable to Mrs. Frick.***

(1) Equitable Life Assurance Society Policy No. 164,814, on which one hundred fourteen thousand ($114,000) dollars was paid to Mrs. Frick, was dated November 23, 1901, and was made payable to "Ada H. C. Frick if living; if not, then to her husband, Henry C. Frick, his executors, administrators or assigns." No right was reserved in the policy to change the beneficiary or to surrender the policy; nor were any rights or powers of any kind reserved to the insured or to Mrs. Frick. It was a paid-up policy. No premiums were ever paid on it by Mr. Frick. It was issued in consideration of the surrender of a policy in the same company belonging to Mrs. Frick, taken out in 1886.

(2) Equitable Life Assurance Society Policy No. 294,284 for fifty thousand ($50,000) dollars, dated March 17, 1885, was made payable to "Ada H. C. Frick, if living; if not, then to her husband, Henry C. Frick, his executors, administrators or assigns." On this policy at the time of Mr. Frick's death there was paid directly to Mrs. Frick seventy-eight thousand forty-four and 1/100 ($78,044.01) dollars. The policy did not contain any provision giving either to the beneficiary or

to Mr. Frick the right to change the beneficiary. It contained a provision that upon the completion of the tontine dividend period, on March 17, 1900, Mr. Frick should have the option either to withdraw the accumulated reserve in cash, convert the accumulated reserve into a paid-up policy, continue the insurance for the original amount and apply the surplus to the purchase of an annuity, or to withdraw the accumulated surplus. Mr. Frick did not exercise any of these options.

(b) *Policies taken out in Mr. Frick's name and assigned to Mrs. Frick.*

(3) New York Life Insurance Company Policy No. 103,932, for ten thousand ($10,000) dollars, dated February 2, 1874, was made payable to Henry C. Frick's legal representatives. By a paper signed April 25, 1882, Mr. Frick assigned the policy to Mrs. Frick. He did not reserve a right to change the beneficiary. The proceeds of the policy, amounting to thirteen thousand five hundred eighty-one and 80/100 ($13,581.80) dollars, were paid to Mrs. Frick at the time of Mr. Frick's death. The policy provided that if the insured were alive on February 2, 1894, the insured should have the right at his option (a) to apply the accumulated dividends to the purchase of an annuity; (b) to continue the original assurance and withdraw the accumulated dividends in cash; (c) to withdraw the accumulations in cash; (d)

to convert the accumulations into a paid-up policy; (e) to convert the entire equity into an annuity. Mr. Frick did not exercise any of these options.

(4) Mutual Life Insurance Company Policy No. 163,109, for ten thousand ($10,000) dollars, dated December 19, 1874, was made payable to assured, his executors, administrators or assigns. There was no provision in the policy with reference to assignments, surrenders or options. Mr. Frick assigned this policy on April 21, 1882, to Ada H. C. Frick, his wife. He did not reserve the right to revoke the policy or to change the beneficiary. The proceeds of this policy amounting to fifteen thousand two hundred two and 28/100 ($15,202.28) dollars, were paid on December 29, 1919, to Ada H. C. Frick.

(c) *Policies taken out in Mr. Frick's name and assigned to Miss Frick.*

(5) Berkshire Life Insurance Company Policy No. 31,580, for twenty thousand ($20,000) dollars, dated March 18, 1890, was made payable to insured's executors, administrators or assigns. The policy provided that at the expiration of each period of five years, the distributive surplus could be applied either to the purchase of additional insurance or could be taken down in cash. Mr. Frick did not exercise any of these options. It was further provided that the company should

not be held to have notice of assignments unless they were filed with the company. On June 19, 1917, Mr. Frick assigned all his right, title and interest in this policy to Helen C. Frick, if she survived him; otherwise to his executors, administrators or assigns. He reserved only the power to apply dividends to the payment of premiums on the policy. On December 28, 1919, the proceeds of this policy, twenty-seven thousand eight hundred forty-three and 60/100 ($27,843.60) dollars, were paid to Helen C. Frick.

(6) Connecticut Mutual Life Insurance Company of Hartford Policy No. 190,366, for fifty thousand ($50,000) dollars, dated March 21, 1890, was made payable to the insured's legal representatives. The policy provided that at certain periods it might be surrendered and the cash value be paid to the insured; that no assignment should be valid unless made in writing and filed with the company. A table of paid-up insurance is attached to the policy. On June 19, 1917, Henry C. Frick assigned this policy to Helen C. Frick, with the proviso that, if he survived her, all her rights should revert to him, and he reserved to himself the right to collect any dividends or profits and to revoke the assignment. (This he never did.) On January 6, 1920, the proceeds of this policy, seventy-one thousand two hundred eighty-six and 76/100 ($71,286.76) dollars, were paid to Helen C. Frick.

(7) New York Life Insurance Company Policy No. 501,052, for twenty-five thousand ($25,000), dated December 29, 1892, was made payable to "the insured's executors, administrators or assigns." The policy contained the provision that if the insured were alive on December 22, 1912, the insured had the right either (1) to receive the proportionate dividends in cash or in annuities or in paid-up insurance, or (2) to exchange the policy for its entire value either in cash or in an annuity or in a paid-up policy. The policy provided that after four years the company would make advances as loans thereon in certain amounts. (Mr. Frick never exercised any of these options.) It also provided that assignments of the policy must be made in duplicate and sent to the home office. On June 19, 1917, Mr. Frick assigned this policy to Helen Clay Frick. The assignment provided that in the event of the prior death of Helen C. Frick the assignment should be null and void, and reserved the right to revoke the assignment at any time. This power was never exercised. The proceeds of this policy, twenty-five thousand one hundred ninety-three ($25,193) dollars, were paid December 18, 1919, to Helen C. Frick.

(8) New York Life Insurance Company Policy No. 497,958, for sixty-five thousand ($65,000) dollars, dated December 22, 1892, was

made payable to the insured's executors, administrators or assigns. The policy provided that if the insured were alive on December 22, 1912, he should have the right to continue the policy and receive the dividends either in cash or in an annuity or in additional insurance, or should have the right to exchange the policy for its entire value either in cash or in an annuity or in a paid-up policy. The company also agreed to make loans after the policy was in force five years. (Mr. Frick never exercised any of these powers.) The policy provided that any assignment made must be sent to the home office. This policy was assigned on June 19, 1917, to Helen C. Frick, with the proviso that, in the event of her prior death, the assignment should be null and void, and the right was reserved to revoke the assignment at any time. This power was never exercised. The proceeds of this policy, amounting to sixty-five thousand five hundred one and 80/100 ($65,501.80) dollars, were paid on December 18, 1919, to Helen C. Frick.

(d) *Policies in which the beneficiary was changed from Mr. Frick's estate to Miss Frick.*

(9) State Mutual Life Assurance Company of Worcester, Massachusetts, Policy No. 23,135, for twenty thousand ($20,000) dollars, dated March 19, 1890, was made payable to Mr. Frick's executors, administrators or assigns. The policy

provided that no assignment should take effect until it was registered with the company. It contained provisions for the payment of cash surrender values and for paid-up insurance. (These powers were never exercised by Mr. Frick.) On June 19, 1917, Mr. Frick nominated Helen Clay Frick to be the beneficiary under the policy in case she survived him. The policy contains an endorsement to the same effect. The policy contains no reservation of a right to change the beneficiary. On December 30, 1919, the proceeds of the policy, twenty-eight thousand nine hundred sixty-six and 60/100 ($28,966.60) dollars, were paid to Helen C. Frick.

(10) Nederland Life Insurance Company, Ltd., Policy No. 54,105, for twenty thousand ($20,000) dollars, dated May 31, 1895, was made payable to Henry Clay Frick, his executors, administrators or assigns. The policy gave the right after six years to surrender the policy or to convert it into a paid-up policy, and also to obtain loans on the policy. (These powers were never exercised by Mr. Frick.) On June 19, 1917, Mr. Frick requested that the policy be made payable to Helen Clay Frick, or in case of her previous death to his executors, administrators or assigns. The policy has endorsed on it the statement that the amount of insurance was made payable to Helen Clay Frick, or, if she should not then be

living, to the insured's executors, administrators or assigns. There was no reservation of a right to make any further changes. On February 21, 1920, the proceeds of the policy, twenty thousand ($20,000) dollars, were paid to Helen C. Frick.

(11) Mutual Benefit Life Insurance Company Policy No. 158,055, for ten thousand ($10,000) dollars, dated April 7, 1890, was made payable to Henry Clay Frick, his executors, administrators or assigns. The policy provides that after it has been in force for two years it may be surrendered and the cash surrender value paid, or it shall have a loan value, or it will be extended as paid-up insurance. (Mr. Frick never exercised these options.) On June 19, 1917, Mr. Frick requested the company to make the beneficiary Helen Clay Frick, with the provision that, if she were not living at his death, the policy should be payable to his estate. He made no reservation of a right to change the beneficiary; nor does the policy contain any such provision. On January 9, 1920, the proceeds of this policy, fifteen thousand nine and 67/100 ($15,009.67) dollars, were paid to Helen Clay Frick.

Assignments of Policies

See page 16 of the brief for defendants in error.

The assignment of the Mutual Life Insurance Company of New York Policy No. 163109 is as follows:

"Form of Assignment.

For One Dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer and set over to Ada H. C. Frick (wife) of Pittsburgh, Pa., all my right, title and interest in this Policy No. 163109 issued by The Mutual Life Insurance Company of New York, and for the consideration above expressed I do also for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, her executors, administrators, and assigns, and their title to the said policy will forever warrant and defend.

Dated in Pittsburgh, this 21st day of April, 1882.

H. C. Frick.

In presence of

M. M. Bosworth."

The assignment of New York Life Insurance policy No. 103,932 is as follows:

"(No. 126)

For Value Received I hereby assign and transfer unto my wife, Ada H. C. Frick of Pittsburgh, Penna. the Policy of Insurance known as No. 103,932, issued by the New York Life Insurance Company upon the life of Henry Clay Frick, of Pittsburgh, Pa., and all dividend, benefit, and advantage to be had or derived therefrom, subject to the conditions of the said Policy, and to the Rules and Regulations of the Company.

Witness my hand and seal, this 22nd day of April (1882), one thousand eight hundred and eighty-two.

Henry Clay Frick.

State of Pennsylvania,
County of Allegheny, } *ss:*

On this 22nd day of April, 1882, before me personally came Henry Clay Frick to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

H. T. Morris,
Notary Public.

THE NEW YORK LIFE INSURANCE COMPANY, in accordance with its rules, as stated below, acknowledges the receipt of the duplicate of this assignment, but assumes no responsibility for its validity.

WM. H. BEEIS, *V. P.*,
Penna.

New York, April 25th, 1882.

NOTICE—The rules of the Company require that Assignments of Policies issued by it shall be made in duplicate; that both copies shall be sent to the Home Office for acknowledgment; that one copy shall be retained by the Company and the other returned; and that under no circumstances shall the Company assume any responsibility for the validity of any Assignment.

The acknowledgment must be made before an Officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

(Ed. 4-15-81.)"

Copy of Equitable Life Policy No. 164,814, Payable to Mrs. Frick.

(See page 18 of the brief for defendants in error.)

"No. 164,814. The Equitable Life Assurance Society of the United States, 120 Broadway, New York. Assurance on the Life of H. C. Frick. Amount, $114,000. Term: Life. Paid-up, Without Profits. Self—T—01, 10. Register Date: Nov. 23rd, 1901.

Provisions and Requirements referred to in this contract.

1. The limits of travel and residence allowed under this contract include those parts of the settled limits of the United States and British Possessions which lie between the parallels of 50° and 36° 30′ north latitude; also, that part of Tennessee which lies east of the Tennessee river; also, those parts of Alabama, Georgia, South Carolina and North Carolina which lie north of the parallel of 34° north latitude, and at the same time more than 100 miles from the Atlantic Coast; also, all the places within fifty miles of Atlanta, Georgia; also, the settled limits of the United States which lie between the 100th and 109th degrees west longitude, and at the same time north of the parallel of 32° north latitude; also, all the settled limits of the United States which lie west of the 109th meridian of west longitude, except

Alaska; also, all of Europe. Also, before July 1st and after November 1st in any calendar year, those parts of the settled limits of the United States which lie south of the parallel of 36° 30′ north latitude. Travel is permitted in first-class vessels, by direct route, along the coast of the United States and British North America Possessions, and between Europe and said British Possessions and the United States, provided no port is entered not included at the time in the limits above allowed for travel and residence. But travel and residence of the person upon whose life this contract depends, beyond the above limits or at other seasons than are above stated, without permission in writing, signed by one of the Executive Officers of the Society as designated below, will render this contract void.

2. Engagement by the person, upon whose life this contract depends, in any of the following occupations or employments, without permission in writing, signed by one of the Executive Officers of the Society as designated below, will render this Contract void: Blasting, mining, submarine labor, aeronautic ascensions, the manufacture, handling or transportation of inflammable or explosive substances, service upon any railroad train, or in switching, or in coupling cars, or on any steamboat, or other vessel or boat, and military and naval service of every kind, whether as

combatant or non-combatant, the militia, in time of peace, excepted.

3. The age of the person upon whose life this contract depends will be admitted during lifetime by the Society on due proof, but if not so admitted, proofs of age must be submitted with proofs of death, and the amount of assurance due under this contract at its maturity shall in no case be more than the amount of paid-up assurance to which the Assured would have been entitled at his true age under the form of Policy surrendered for this paid-up contract.

4. This contract cannot be varied except in writing by one of the following Executive Officers of the Society, at its Home Office in New York, viz.: the President, one of the Vice Presidents, the Secretary, the Assistant Secretary, the Comptroller, the Actuary, the Assistant Actuary, the Treasurer, the Auditor, the Associate Auditor, the Recorder, the Registrar or the Assistant Registrar.

POLICY NO. 164,814.

EQUITABLE
LIFE ASSURANCE SOCIETY

Premium Amount $114,000.

OF THE UNITED STATES.

Age............ No. 164,814.

120 Broadway, New York.

Henry Baldwin Hyde, Founder, July 26, 1859.

WITHOUT PROFITS.

In Consideration of the surrender of Policy No. 336181, which policy and the Application therefor are hereby referred to and made a part of this contract, the Equitable Life Assurance Society of the United States does promise to pay to Ada H. C. Frick if living, if not, then to her husband, Henry C. Frick, his executors, administrators or assigns, at the Office of the Society in the City of New York, One Hundred and Fourteen Thousand Dollars upon receipt of satisfactory proofs of the death of said Henry C. Frick of Pittsburgh, in the County of Allegheny, State of Pennsylvania.

And the said Society does hereby further PROMISE AND AGREE that the only conditions which shall be binding upon the holder of this Contract are that the regulations of the Society as to age, residence, travel, occupation and employments

shall be observed, and that in all other respects this Contract shall be indisputable.

THIS CONTRACT is issued and accepted upon the condition that the provisions and requirements, printed or written by the Society upon the back hereof, form a part of this Contract, as fully as if they were recited at length over the signatures hereto affixed.

New York, November 23rd, 1901.

Examined by

K

A. A. BLISS for the Society.

F. H. FENNING for the Society.

Paid-up, Without Profits, Self—T—01, 10.

LIFE INSURANCE EXEMPTION LAWS.

See page 28 of the brief for defendants in error.

1. *Connecticut.*

See Connecticut General Statutes, Revision of 1918, Vol. 2, p. 1480.

"SECTION 5277. *When life insurance for benefit of wife inures to separate use.* Any policy of life insurance, expressed to be for the benefit of a married woman, or assigned to her, or in trust for her, shall inure to her separate use, and, in case of her decease before the death of the insured or maturity of the policy from other cause,

and if so specified in the policy, shall inure to the use of her children or of her husband's children; but if the annual premium on such policy shall exceed $500, the amount of such excess paid in fraud of creditors shall, with interest, inure to the benefit of the creditors of the person paying the premium; and if such married woman shall die before the death of the insured or maturity of the policy from other cause, the policy shall inure to the use of the person who has paid the premiums, unless otherwise provided in such policy."

(Rev. 1902, Section 4548, 1905, ch. 52.)

2. *Massachusetts.*

See General Laws of Massachusetts 1921, Vol. 2, p. 2001.

"SECTION 126. Every policy of life insurance or endowment insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or any other person and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject to the provisions of the preceding section relative to premiums paid in fraud of creditors and to Sections 144 to 148, inclusive."

3. *New Jersey.*

See New Jersey Compiled Statutes, 1709 to 1910, Vol. 2, p. 2850.

"SECTION 39. *Policies to inure to benefit of married women.* Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children according to the terms and provisions of the policy or assignment, subject to the above provisions relating to premiums paid in fraud of creditors."

(P. L. 1902, p. 422.)

4. *New York.*

Chapter 80, Acts of 1840, p. 59, entitled, *An Act in Respect to Insurance for Lives for the Benefit of Married Women.*

"SECTION 1. It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case

of her surviving her husband, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars.

SECTION 2. In case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable after her death to her children for their use, and to their guardian, if under age.

* * * * * *

Chapter 272, Acts of New York, approved April 17, 1896, Vol. 1, Pamphlet Laws of New York, page 220.

"SECTION 22. *Insurance of Husband's Life.* A married woman may in her own name or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or a representative of her husband, except, that where the premium

actually paid annually out of the husband's property exceeds five hundred dollars that portion of the insurance money which is purchased by excess of premium above five hundred dollars is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband, or to his, her, or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such property by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendants surviving. After the will or assignment takes effect, the legatee or assignee takes such policy absolutely. A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured."

5. *Pennsylvania.*

The Act of April 15, 1868, P. L. 103, provides explicitly that all policies of life insurance which have been taken out for the benefit of or assigned

to the wife or children or any dependent person shall be vested in such wife or children or dependent person. Section 1 of the Act is as follows:

> "Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That all policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken out for the benefit of, or *bona fide* assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear from all claims of the creditors of such person."

This Act was followed by the Act of March 14, 1873, P. L. 46, which authorizes assignees of life insurance policies to bring suit in their own names.

This Act was followed by the Act of May 5, 1915 P. L. 253, the practical effect of which was to make certain the rights of the wife and children under the Act of 1868, in policies where the insured had the right to change the beneficiary, the language of the Act being

> "* * * notwithstanding the right to change the beneficiary named has been reserved by the insured or is permitted by the insurer."

This Act of 1915 was re-enacted in slightly different language and repealed by the Act of May 17, 1919 (P. L. 207), the change made by the later act being that while the Act of 1915 referred to its subject matter as "all policies of insurance," the Act of 1919 says "the net amount payable by the insurer under any policy."

Even before the last two acts were passed the Supreme Court of Pennsylvania, in *Entwistle vs. Travelers Insurance Co.*, 202 Pa., 141, had held that the interests of a wife and children in a policy taken out by the husband on his own life and made payable to them as beneficiaries were vested interests which the insured was powerless to disturb. The policy in this case was made payable to the wife, if she survived her husband, or, in the event of her prior death, to the children, but, if the insured survived the wife and children, then to his legal representatives. The policy contained the further clause that it might be converted into cash at the option of the holder at any time after the expiration of fifteen years. Some time after the policy was issued the insured and his wife together assigned the policy to an assignee, who at the end of the fifteen years attempted to exercise the option and take down the cash. He was not permitted to do so, because the children had a vested interest. The Supreme Court of Pennsylvania held that neither the husband nor the wife,

nor both together, had power to destroy the vested interest of the children in the policy, and that the assignee of the husband and wife had no right to exercise the option. Justice Potter says on page 143:

> "* * * The interest of the children of the insured, which was created for them by the contract when the policy was issued, vested in them at the same time that the interest of the wife became vested in her. Both interests were contingent. If the wife die before the insured, she will take nothing under the policy. If the insured should die before the wife, then the children take nothing under the policy. We see no reason to discriminate between the wife and the children. They are all payees, under the policy, and together constitute the 'assured'."

And again on page 144:

> "* * * The provision that the policy may be converted into cash at the option of the holder does not change the relative rights of the parties. We agree entirely with the suggestion that 'holder,' or 'holders,' as used in this connection, means those who in law are the owners of the policy, and are entitled to the rights and benefits which may accrue under it; in other words, all the beneficiaries; in the present case, not only the wife, but the children of the insured. If for any reason, prudence required the conversion of the policy into cash, a guardian would have no special difficulty in reasonably protecting the

interest of his wards. But however that may be, it is manifest that the option can only be exercised by those having the full legal interest in the policy, or by their assignee. Neither the husband, nor the wife, nor both together had power to destroy the vested interest of the children in the policy."

Regulations 37, Article 32.

See page 19 of the brief for defendants in error.

Taxable insurance. The statute provides for the inclusion in the gross estate of certain forms of insurance taken out by the decedent upon his own life. Two kinds of insurance are taxable: (a) all insurance payable to the estate; (b) insurance payable to individual beneficiaries to the extent that it exceeds $40,000. The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds

belonging to, or advanced by, the decedent. Where the decedent takes out insurance in favor of another person or corporation, as collateral security for a loan or other accommodation, and the decedent, either directly or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. Where the decedent assigns a policy, and retains no interest therein, and thereafter pays no part of the premiums, the insurance will not be considered in determining whether there is such a taxable excess.

Quotation from Coke upon Littleton.

See page 29 of the brief for defendants in error.

The passages in *Coke upon Littleton* in which are mentioned estates limited until I. S. come from Rome, or to be void if the donee go not to Rome before such a day, as reprinted in *5 Gray, Cases on Property,* at page 3, are as follows:

> "Co. Lit. 214-b. Hereupon is to be collected divers diversities. First, between a condition that requireth a re-entry, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger, as Littleton saith, shall take any advantage, as hath been said. But of limita-

tions it is otherwise. As if a man make a lease *quousque*, that is, until I. S. come from Rome, the lessor grant the reversion over to a stranger, I. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by the express limitation was determined. * * *

2. Another diversity is between a condition annexed to a freehold, and a condition annexed to a lease for years.

For if a man make a gift in tail or a lease for life upon condition, that if the donee or lessee goeth not to Rome before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entry; * * *"

Change in Statutory Language as Affecting Construction.

(See page 43 of the brief for defendants in error.)

In *Shwab vs. Doyle,* this Court, by Mr. Justice McKenna, adverting to the fact that Congress had later made the provision there in question retroactive, used the following language (p. 536):

"If Congress, however, had the purpose assigned by the Commissioner it should have declared it; when it had that purpose it did declare it. In the Revenue Act of 1918, 40

Stat. 1097, it re-enacted Section 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed whether 'made or created before or after the passage of' the act. And we cannot accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one."

This reasoning has been the basis of several recent decisions of this Court. In *Smietanka vs. First Trust & Savings Bank,* 257 U. S., 602, after holding that, under the Income Tax Act of 1913, income held and accumulated by a trustee for unborn and unascertained beneficiaries was not taxable, Mr. Chief Justice Taft declared (p. 607):

"The Act of September 8, 1916, c. 463, 39 Stat. 757, specifically declared that the income accumulated in trust for the benefit of unborn or unascertained persons should be taxed and assessed to the trustee. It is obvious that, in the acts subsequent to that of 1913, Congress sought to make specific provision for the *casus omissus* in the earlier act.

* * * In the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries or for the trust or the estate. But Congress did not do so. In the next act, it did so. We cannot supply the omission in the earlier act."

In *United States vs. Field,* 255 U. S., 257, it was held, "applying the accepted canon that the provisions of such acts are not to be extended by implication" (p. 262), that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment. Mr. Justice Pitney, delivering the opinion of the court, relied on the fact (p. 264) that Congress had in a later Act expressly imposed the tax on such property, to hold that the Act of 1916 did not impose the tax.

In *Louisville & Nashville R. R. vs. Mottley,* 219 U. S., 467, Congress had changed the phraseology of the Interstate Commerce Act from "greater or less compensation" to "greater or less or different compensation." In interpreting this language, Mr. Justice Harlan remarked at p. 475, "We cannot suppose that this change was without a distinct purpose on the part of Congress."

This general principle has been widely applied by the lower federal courts. In *Irwin vs. Gavit*, 295 Fed., 84, in the Circuit Court of Appeals for the Second Circuit (cert. gr., 264 U. S., 579), Judge Manton said, p. 88:

> "Under the Act of October 3, 1913, the levy, assessment and payment is upon the net income of any person residing in the United States, though not a citizen thereof under Section 2-A, subd. 1. And under sub-division 2 'individuals' are charged with the normal

tax and every 'person' subject to additional tax must make a 'personal' return and the net income of a taxable 'person' is defined in Section 2-B. There is nothing in the act which makes an estate a 'citizen' or a 'person' and the income of an estate is therefore not taxable. The 1916 act indicated a congressional intention to levy and impose an income tax upon an estate. 39 Stat. 757; Act of 1916, Sec. 2 (Comp. St., Sec. 6336-b). The fact that the prior act is amended by the 1916 enactment demonstrates the intent to change the pre-existing law, and the presumption is that it was intended to change the statute in all particulars touching which we find a material change in the language of the act."

In *Douglas vs. Edwards,* 298 Fed., 229, Judge Mayer said (p. 238):

"It is an accepted principle that for purposes of statutory construction, within certain limits, resort may be had to subsequent statutes."

The holding of *Monroe Cider Vinegar & Fruit Co. vs. Riordan,* 280 Fed., 624, in the Circuit Court of Appeals for the Second Circuit, is stated in the headnote as follows:

"The Revenue Act of 1921, which adopted a classification of taxable beverages which differed from previous classifications and included a new classification of still soft drinks which might appropriately include

> sweet cider, and then expressly excluded from such classification sweet cider, indicates an understanding by Congress that sweet cider was not taxed as a soft drink under the Revenue Act of 1918 (Comp. St. Ann. Supp., 1919, Sec. 6161½d). * * *
>
> Where the construction of a revenue law is doubtful, and seriously debatable, the tax will not be construed to apply to the doubtful article."

And in *United States vs. Woodruff Co.*, 175 Fed., 776, also in the Circuit Court of Appeals for the Second Circuit, Judge Ward said:

> "Where * * * the statute repeals or replaces an earlier law, any change of language is more consistent with a change of intent than with the purpose of defining or declaring the meaning of the language of the earlier repealed statute."

Tax Laws Are Strictly Construed.

(See page 44 of the brief for defendants in error.)

Other cases in which ambiguities in tax laws were construed in favor of the taxpayer are the following:

United States vs. Merriam, 263 U. S., 179, involved the question whether the Income Tax Act of 1913, which taxed "the income from but

not the value of property acquired by gift, bequest, devise or descent," applied to a bequest to an executor in lieu of commissions. Holding such gifts not to be taxable, Mr. Justice Sutherland stated the rule of interpretation applicable to ambiguous tax provisions, at p. 187, as follows:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

In *Gould vs. Gould*, 245 U. S., 151, it was held that alimony did not come within the terms of the items described as "income" in the Income Tax Act of 1913. Mr. Justice McReynolds stated in the opinion, at p. 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

Eidman vs. Martinez, 184 U. S., 578. In this case it was held that the War Tax Law of

1898, imposing a legacy tax on personal property passing "either by will or by the intestate laws of any State or Territory," did not apply to intangible personal property passing by the law of a foreign country. Mr. Justice Brown stated (headnote):

> "Congress is bound to express its intention to tax in clear and unambiguous language, and a liberal construction should be given to words of exception confining the operation of the duty."

Benziger vs. United States, 192 U. S., 38. Interpreting the meaning of the words "cast of sculpture," as used in paragraph 649 of the Tariff Act of 1897, Mr. Justice Peckham stated, at p. 55:

> "The provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the true construction of the provision in question, the courts should resolve the doubt in his favor."

United States vs. Isham, 17 Wall., 496. Mr. Justice Hunt, interpreting the Act of June 30, 1864, by which a stamp tax on instruments was imposed, stated, at p. 504:

> "4th. If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B.,

in *Girr vs. Scudds* (11 Exchequer, 191), 'a tax cannot be imposed without clear and express words for that purpose.'

These principles are based in good sense, and are sustained by the authorities."

United States vs. Coulby, 258 Fed., 27;
Brown vs. United States, 298 Fed., 177;
Plant vs. Walsh, 280 Fed., 722;
Empire Fuel Company vs. Hays, 295 Fed., 704.

In the last case, Baker, D. J., stated the rule as follows, at p. 708:

"Courts, in considering cases of this nature, will, so far as they can within bounds of reason, resolve every doubt, giving every reasonable inference, interpreting every statutory ambiguity, in favor of the taxpayer."

Statutes Are Construed so as to Avoid Unconstitutionality.

(See page 45 of the brief for defendants in error.)

Numerous cases decided by this Court demonstrate its consistent refusal to adopt a construction of a statute which would raise constitutional questions when another construction, not raising such questions, was reasonably available. Indeed, this is but a corollary of the

established practice of this Court not to decide a case on constitutional grounds at all if any other ground of disposition can be found, a rule of practice which was applied by Mr. Chief Justice Taft in the first of the Kansas Industrial Relations Act cases, *Howat vs. Kansas,* 258 U. S., 181 (1922). That rule was applied by Mr. Justice White to the construction of the commodities clause of the Hepburn Act in *United States vs. Delaware & Hudson Co.,* 213 U. S., 366 (1909), in the following language (p. 407):

> "It is elementary that when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. * * * the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman vs. Interstate Com. Comm.,* 211 U. S., 407."

The same rule was applied in *Presser vs. Illinois,* 116 U. S., 252, 269 (1886), in *Hooper vs. California,* 155 U. S., 648, 657 (1895), in *Knights Templars' Indemnity Company vs. Jarman,* 187 U. S., 197, 205 (1902), and in *Addy*

Company vs. United States, 264 U. S., 239, 245 (1924), and was only recently stated by Mr. Justice Van Devanter in *Panama Railroad Company vs. Johnson*, 264 U. S., 375 (1924), as follows (p. 390):

> "But, as this Court has often held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' *U. S. vs. Jin Fuey Moy*, 241 U. S., 394, 401; *U. S. vs. Delaware & Hudson Company*, 213 U. S., 366, 407-408; *Baender vs. Barnett*, 255 U. S., 224."

An Excise Tax on a Completed Property Transfer is Unconstitutional.

(See page 52 of the brief for defendants in error.)

The fact that Congress may not use the taxing power to cloak a violation of the Fifth Amendment is shown in a number of cases.

In *McCray vs. United States*, 195 U. S., 27, 64, the Court stated:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for

revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

In *Pollock vs. Farmers' Loan and Trust Company*, 157 U. S., 429, 599, Mr. Justice Field stated:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

It has been expressly held that the Fifth Amendment sets limitations to the taxing power of Congress.

In *Choate vs. Trapp*, 224 U. S., 665, a state tax authorized by Congress to be imposed on Indian land previously exempt from taxation was held illegal. Mr. Justice Lamar said:

> "Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property."

In *Towne vs. McElligott,* 274 Fed., 960, Judge Learned Hand held that the federal taxing power was limited by the Fifth Amendment.

Aside from questions of territorial jurisdiction and special constitutional prohibition, which are not here involved, there is no difference between the limitations imposed on the states by the Fourteenth Amendment and those imposed upon Congress by the Fifth. As stated by Mr. Justice Holmes in *Carroll vs. Greenwich Insurance Company,* 199 U. S., 401, 410, "If an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth." Yet, under the Fourteenth Amendment it has been repeatedly held by state courts that a state statute imposing a retrospective inheritance tax is an unconstitutional interference with vested rights, and therefore a deprivation of property without due process of law.

The most celebrated of these cases is *In re Pell,* 171 N. Y., 48, in which Judge Bartlett, for the Court, stated at page 55:

> "This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary

estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and *take private property for public use without compensation.*" (Italics ours.)

This case has been repeatedly followed in New York and other states.

In *Hunt vs. Wicht*, 174 Calif., 205, 162 Pac., 639, a tax on a past transfer intended to take effect at death was held to be unconstitutional. Chief Justice Angellotti said:

"The right of the grantee to have actual physical possession of the property itself, and enjoyment of the other incidents of an estate for life, upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and non defeasible, and the legislature could not thereafter law-

> fully destroy, impair or burden this property right under the guise of a succession tax on account of the transfer * * *. It is the vesting in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time."

In *Lacey vs. State Treasurer,* 152 Iowa, 477, 132 N. W., 843, Judge McClain declared:

> "If the right to the property passed by the conveyance beyond the control of the grantor, it was a vested right; it was not a mere expectancy like the prospective right of an heir or the inchoate right of a wife, and it was therefore not subject to burdens which the legislature might attempt to impose by retrospective laws."

In *State vs. Probate Court,* 102 Minnesota 268, 113 N. W., 888, the court said:

> "That law is prospective in its operation, and it is beyond the power of the state, even if it so desired, to subject to its operation property which the owner in good faith disposed of before his death."

The same view was taken by the Supreme Court of Virginia in *Commonwealth vs. Wellford,* 114 Va., 372, 76 S. E., 917.

The position so uniformly taken by the state courts, that the inclusion in the measure of the tax of property long since beyond the control of

the testator is arbitrary and unconstitutional, has been taken with reference to Section 402 (c) of the Revenue Act of 1918 by the District Court of Massachusetts. *Coolidge vs. Nichols*, Law No. 2236, January 28, 1925. In the course of his charge to the jury, holding the section in question unconstitutional and void as applied to property contained in a trust estate created in contemplation of death before the passage of the act, Judge Brewster declared:

> "When one has availed himself of this privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable. Such an arbitrary inclusion of property of others has been held in other jurisdictions invalid as unconstitutional."

See Judge Brewster's opinion as printed at length in this appendix at pages 83 a, 101 a.

Computations of Proportions of Tax Borne by Estate and Beneficiaries of Policies.

(See brief for defendants in error at pages 4, 12, 15, and 67).

The percentages of the total tax of $108,657.38 to be borne by the estate and by the beneficiaries respectively are determined as follows:

The amount of the insurance policies, less the $40,000 exemption, was $434,629.52. The amount of the net taxable estate of Mr. Frick, as shown in the federal estate tax return made by the executors to the Collector of Internal Revenue, was $28,629,594.73. The tax originally paid by the estate was calculated by the Department of Internal Revenue upon that preliminary return, in the sum of $6,338,898.68, and it is that part of this total tax which was calculated on $434,629.52 at 25 per cent., namely $108,657.38, which is the subject of this suit. Applying the language of Section 408 of the Act (reprinted at p. 9 a of this Appendix), we find that $434,629.52 is 1.5181 per cent. of $28,629,594.73. 1.5181 per cent. of $6,338,898.68 equals $96,230.80, the amount to be borne by the beneficiaries, and leaves $12,426.58 to be borne by the estate. The proportion of the total tax of $108,657.38 to be

borne by the beneficiaries therefore equals 88.56 per cent., and that to be borne by the estate equals 11.44 per cent.

The uncertainty of the executors as to the ultimate value of their right against the beneficiaries under Section 408 is illustrated by events occurring since this suit was brought. Additional assessments were made by the Department of Internal Revenue in the total amount of $4,548,795.68, on which the executors have paid additional taxes in the aggregate sum of $1,137,198.92, making a total estate tax, actually paid, of $7,476,097.60, on a total net estate of $33,178,390.41. The consequence of this change in the variable factors on which the right of reimbursement of the executors depends is at once apparent. A computation identical with that used above shows that, on the figure as they *now* stand, the executors will be able to recover $99,781, or 90.06 per cent. of the total insurance tax of $108,657.38.

The utter unpredicability of executors' rights against insurance beneficiaries under the statute is further illustrated by the situation which would have arisen if Mr. Frick had made no bequests to charities. The value of the net estate would have approximated $83,400,000, and the Federal estate tax on that amount would

have been $20,031,500. Calculated by the method prescribed in Section 408, the amount recoverable by the executors against the beneficiaries out of a total tax increase of $108,657.38, imposed upon the estate by reason of the policies, would be $104,384.15, as against $96,230.80 under the facts existing at the time this suit was brought.

These results, based on the actual facts of Mr. Frick's estate, invite speculation as to whether any rational connection can be discovered between the proportion of the tax on insurance proceeds (taken constantly at $434,629.38, the amount taxable in this case), recoverable by the executors, at given values of the net taxable estate taken at random, and such values of the net taxable estate. The following tabulation, the results shown by which are sufficiently accurate for our present purpose, may show whether or not the amount recoverable by the executors under given conditions is governed by any consistent rule of policy, convenience or logic, or merely by the caprice of circumstance.

[illegible]

Net Taxable Estate	Tax on Insurance Proceeds (434,629.52)	Percentage Recoverable by Executors
200,000,000.00	108,657.38	98.37
83,400,000.00	108,657.38	96.02
35,000,000.00	108,657.38	90.646
33,178,390.41	108,657.38	90.06
30,000,000.00	108,657.38	89.10
28,629,594.73	108,657.38	88.56
20,434,629.52	108,657.38	84.01
18,000,000.00	108,657.38	81.82
15,000,000.00	108,657.38	73.56
12,000,000.00	108,657.38	72.71
11,000,000.00	108,657.38	70.23
10,434,629.52	108,657.38	68.633
10,000,000.00	95,618.46	76.4
9,000,000.00	95,618.46	73.8
8,434,629.52	95,618.46	71.52
8,000,000.00	86,925.87	77.8
7,000,000.00	86,925.87	74.4
6,000,000.00	86,925.87	70.08
5,434,629.52	86,925.87	67.41
5,000,000.00	78,233.31	71.27
4,434,629.52	78,233.31	67.61
4,000,000.00	69,541.12	72.2
3,434,629.52	69,541.12	67.49
3,000,000.00	60,848.13	71.78
2,434,629.52	60,848.13	65.23
2,000,000.00	52,155.52	67.28
1,000,000.00	31,078.16	71.9
750,000.00	23,385.18	78.06
500,000.00	15,692.58	91.4
450,000.00	13,346.29	97.5
435,000.00	12,696.29	99.94

(It should also be noted that if the amount of the proceeds, which is kept constant in this tabulation, is varied, the percentage of recovery necessarily changes with it, since that amount is an important factor in the computation.)

These results defy rationalization. One can understand an intent to make the beneficiaries bear a larger proportion of a tax allocable to insurance policies as the net taxable estate of the insured grows larger. That would be rational in a mathematical sense, although it would involve a most unconstitutional discrimination against beneficiaries of policies of equal value on the lives of rich men as against less rich men, or men who have bequeathed largely to charities. Some such intent seems to have been partly manifested in this statute, since the percentages of recovery against the beneficiaries increase with tolerable regularity from 68.6 per cent. where the net taxable estate of the insured equals $10,000,000 plus the proceeds of insurance policies, to 98.37 per cent. at $200,000,000.

Not even that excuse for the rule of Section 408 applies to estates whose net taxable values are less than $10,000,000. The percentages of recovery hover around seventy, being comparatively low where the insurance proceeds are taxed at the highest applicable rate and the rest

of the "estate" at lower rates (*i. e.,* wherever $434,629.52 is added to the highest limit to which a particular rate is applicable), and jumping several points whenever a considerable portion of the remainder of the "estate" is taxed at the same rate as the proceeds of insurance policies.

Nor is that all. No sooner does the net taxable estate fall below $1,000,000, than the percentages of insurance tax to be borne by the beneficiaries jump from 71.9 per cent. at $1,000,000, to 91.4 per cent. at $500,000, and 99.94 per cent. at $435,000, where the net estate less insurance proceeds is only $370.48.

What legislative policy there may be behind requiring beneficiaries to pay a graduated tax, *determined by the value of another man's property,* on the proceeds of their insurance policies, it is difficult to perceive. Why, from the viewpoint of the executors, the beneficiaries should have to bear only a proportion of that tax, the rest being saddled on the estate, it is even more difficult to understand. But why that proportion, far from being a constant factor, should *decrease* from 99.94 per cent. of the tax where the insured left a very small taxable estate, to 71.9 per cent. where that estate is $1,000,000, thereafter range between 65.23 per cent. and 77.8 per cent., for no perceivable reason, until the net taxable estate amounts to $10,000,000, and thereafter *increase*

again by slow degrees to 81.82 per cent. where the net taxable estate of the insured is $18,000,000, 90 per cent. where it is $33,000,000, and 98.37 per cent. where it is $200,000,000, is beyond comprehension.

RETROACTIVE EXCISE TAXES ARE DIRECT TAXES.

(See page 50 of the brief for defendants in error.)

In *Thomas vs. United States*, 192 U. S., 363, a stamp tax upon sales of corporate stock was held not to be a direct tax because, as stated by Mr. Chief Justice Fuller, at page 371:

> "The stamp duty is contingent upon the happening of the event of sale, and the element of absolute and unavoidable demand is lacking."

This language was repeated in *Flint vs. Stone Tracy Company*, 220 U. S., 107, at page 151, in which the Corporation Excise Tax of 1909 was held not to be a direct tax, the court adding, per Mr. Justice Day:

> "—the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

In *Singer vs. United States*, 15 Wall., 111, at page 120, Mr. Justice Field justified an excise tax measured by the capacity of distilleries instead of their actual production in similar language:

> "Every one is advised *in advance* of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distil at all, he is not entitled to much consideration." (Italics ours.)

The excise tax on tobacco manufactured for consumption was stated to be supportable only if imposed while the transactions taxed were still incomplete. *Patton vs. Brady*, 184 U. S., 608. Mr. Justice Brewer stated the decision at page 623 as follows:

> "Within the scope of the various definitions we have quoted there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer.
>
> Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it

has passed into the hands of the consumer; * * *"

The tax, on the present hypothesis, if imposed as an excise upon a past dealing with property, is accordingly not within the legal definition of an excise tax, and must therefore be either a direct tax upon the person imposed by reason of his past acts, or a direct tax upon the property transferred. This conclusion is supported by several decisions of this Court. In the *Pollock case*, at 157 U. S., 558, Mr. Chief Justice Fuller distinguished between direct and indirect taxes in the following manner:

> "The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; *but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.*" (Italics ours.)

In *Dawson vs. Kentucky Distilleries Company*, 255 U. S., 288, it was held that a tax on the exercise of an essential right of ownership, namely, a tax upon whisky either withdrawn

from bond within the state or transferred in bond from the state elsewhere, is not an excise but a property tax. Mr. Justice Brandeis stated at page 294:

> "But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale. * * * The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson vs. Kreutzer*, 112 Mississippi, 165; *Thompson vs. McLeod*, 112 Mississippi, 383. It cannot be made an occupation or license tax by calling it so."

The two Mississippi cases cited in the extract quoted involve similar questions. In *Thompson vs. Kreutzer*, a tax of twenty cents an acre on all persons buying, owning, or holding timber land was held to be a direct tax on property. In *Thompson vs. McLeod* a tax on the extraction of turpentine from any trees in the state was held to be a property tax.

In *Eisner vs. Macomber*, 252 U. S., 189, the

Government's argument that a tax on stock dividends was indirect was answered by this court as follows (p. 217):

> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court."

In other words, a tax on past accumulations is not an excise tax, but a property tax.

In the *Pollock case*, Chief Justice Fuller, at 158 U. S., 628, said:

> "We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinction between that which gives value to property, and the property itself."

The power and right to assign the policies gave value to the policies; a tax on the past exercise of that right is a direct tax on the policies. That a tax imposed upon a disposition of property as

such is a direct tax was recognized by this court in *Nicol vs. Ames,* 173 U. S., 509, Mr. Justice Peckham saying, at page 521:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of the sale is alone regarded."

In the famous case of *In re Pell,* 171 N. Y., 48, it was held that an inheritance tax on a transfer completed before the act was passed was not an excise tax, but a direct property tax.

It cannot be said in reply that because the statute professedly imposes an excise tax, this tax cannot be direct. In the language of Mr. Chief Justice Fuller in the *Pollock case* (157 U. S., 581):

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls,

as has indeed been established by repeated decisions of this court."

On the other hand, no true retroactive excise tax has ever in fact been sustained by this court. Those cases which support the constitutionality of retroactive income taxes are to be distinguished at the outset, since those are direct and not excise taxes. Those cases in which a retroactive excise tax on a completed act was apparently sustained are either distinguishable or were decided in the lower federal courts.

The cases relied on by the Government to show that a retroactive excise tax may constitutionally be imposed, are discussed and distinguished in this appendix at page 66 a ff., *passim.*

The Stamp Tax Cases.

(See page 87 of the brief for defendant in error.)

The question of the validity of stamp taxes imposed by Congress was raised in the Supreme Court in *Nicol vs. Ames,* 173 U. S., 509 (1899), Mr. J. Peckham; *Treat vs. White,* 181 U. S., 264 (1901), Mr. J. Brewer; *Thomas vs. United States,* 192 U. S., 363 (1904), Mr. C. J. Fuller.

In *Nicol vs. Ames,* a stamp tax on sales of stock on the Exchange was sustained as "in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act." Only the *Pollock case* was cited to the point that the fact that the tax was measured by the value of the stock transferred did not render the tax a direct tax within the meaning of the Constitution.

With regard to the uniformity required by the Constitution of all "duties, imposts and excises," the Court said (p. 522):

> "In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, * * *."

Treat vs. White, involving the stamp tax on sales or agreements to sell stock, was disposed of on grounds not involving the nature of direct and excise taxes.

In *Thomas vs. United States,* the stamp tax on stock transfers was held to be a duty, impost or excise because of its similarity to taxes held to be such in the past. The determining char-

acteristics of such taxes were stated to be present because (371)—

> "The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

Cases Relied On in Brief for Plaintiff in Error.

(See pages 91, 94 and 95 of the brief for defendants in error.)

The cases cited by counsel for the Government in their brief to show that an excise tax may be measured in part by property not within the jurisdiction of the taxing power, and may be imposed for that and other reasons on past transactions, are distinguishable for the following reasons:

Flint vs. Stone Tracy Company, 220 U. S., 107. The income from non-taxable property by which the excise tax was measured was income to the corporation and not income from a stranger's property or from property owned in the past. The case therefore affords no analogy to insurance policies payable to strangers, whose rights were acquired in the past.

Maxwell vs. Bugbee, 250 U. S., 525. The property outside of New Jersey which was con-

sidered in determining the rate at which the transfer of New Jersey should be taxed was property of the decedent at the instant of his death, and not property long past conveyed, now belonging to strangers.

Bullen vs. Wisconsin, 240 U. S., 625. The property in question was property of which the decedent had made a conveyance in contemplation of death, a fact which, for tax purposes, made it a part of his estate. The policies in this case were not conveyed in contemplation of death by Mr. Frick. *Tyler vs. Treasurer and Receiver General,* 226 Mass., 306.

Greiner vs. Lewellyn, 258 U. S., 384. The municipal bonds were in fact owned by the decedent at his death. The same distinction applies to *Plummer vs. Coler,* 178 U. S., 115, the Court remarking that the State may lawfully measure the tax by referring to the value of the *property passing.*

United States vs. Perkins, 163 U. S., 625. The property was in fact the decedent's at his death, although, by his will, given to the United States.

Orr vs. Gilman, 183 U. S., 278. The exercise of a power of an appointment was held as a matter of law to be an act essential to the passing of title. For this reason a privilege was exercised by the decedent at his death, by will, the tax on which was properly measured by the value of the property passing.

Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283. The rate of the tax was determined by considering the value of the legacy itself. This was eminently fair. The case does not hold, as the counsel for the Government intimate it does, at page 33 of their brief, that a legacy tax, measured as to its rate by the value of the whole estate of the decedent, is within the constitutional power of the State. It is therefore repeated here (see our brief, p. 78) that such a tax, within the outspoken condemnation of *Knowlton vs. Moore,* is so palpably unconstitutional that no State at the present time undertakes to impose it.

Scholey vs. Rew, 23 Wall., 331. The Government states (p. 24) that the tax was expressly laid on the coming into possession of real estate at the death of either the creator of the title or the predecessor in enjoyment. We confess inability to find the latter alternative in the case. Plainly, Scholey was taxed upon the interest which he took under the will of his wife, who died after the Act was passed, a result which astonishes no one.

Wright vs. Blakeslee, 101 U. S., 174. The Court expressly held that the remainder was contingent, and that the fee did not vest in the remainderman until after the act was passed, at the death of the life tenant. There was therefore the creation of a *new right* in the remainderman at the time of the imposition of the tax, which is

plainly the subject of an excise. Furthermore, no constitutional question was raised or decided in the case.

Keeney vs. New York, 222 U. S., 525. The language reprinted is a passing dictum. Suffice it to say that no such holding has ever been made by this Court in any case raising the question.

United States vs. Singer, 15 Wall., 111. The excise was measured by the capacity of the taxpayer's distilleries. The Court was careful to point out that those who wished to avoid the privilege tax might do so by refraining from distilling. No such option was given in the tax here in question. The same is true of *Veazie Bank vs. Fenno*, 8 Wall., 533. That case, of course, rests primarily upon the power of Congress over the currency.

McCray vs. United States, 195 U. S., 27. The tax on oleomargarine could be avoided by ceasing manufacture. Besides, the Court said that since the States could forbid its manufacture, the United States could discriminate against it (p. 62). There is no such policy behind the patent inequalities of the present tax.

Brushaber vs. Union Pacific Railroad Company, 240 U. S., 1. The tax on the franchise privilege was properly measured by the income earned by the corporation in the preceding year. The tax was not on the income, or on the earning of

it in that year, but on the exercise of corporate privileges within the taxable period. Such a tax is in no sense retroactive.

Hylton vs. United States, 3 Dall., 171. An excise on the exercise of a privilege within the taxable period in which the act takes effect—here, the same day—is not retroactive in the sense of which objection is taken in this case. It is the burdening of transactions of a time long past which is here objected to. The same distinction applies to *Washington Water Power Co. vs. United States,* 56 Ct. Cls. 76, and *Carbon Steel Co. vs. Lewellyn,* 251 U. S., 501. In the latter case, no constitutional question was raised, discussed, or decided.

Patton vs. Brady, 184 U. S., 608. As pointed out in this appendix (p. 59 a), the transaction which was taxed had not yet been completed when the tax was imposed.

Railroad Co. vs. Collector, 100 U. S., 595. The tax was on the franchise, not on the assumption of obligations in the past, by the value of which the tax was measured. The point here is that there was no excisable event at the death of Mr. Frick.

The distinction applied to the *Brushaber case* applies also to *Stockdale vs. Insurance Co.,* 20 Wall, 323. Furthermore, the retroactivity did not extend beyond the tax period in which the act was passed.

The remaining cases cited by the Government on pages 38 and 39 are either distinguishable on grounds above mentioned, or have been reversed by this Court on other grounds, and are all in lower federal courts on questions never decided by this Court.

In *Billings vs. United States*, 232 U. S., 261, mentioned at page 47, there was no evidence that the yachts in question had not actually been used after the act was passed.

The Government places considerable reliance (page 29) on *Will of Allis*, 174 Wis., 527, in which it was held that insurance policies on the life of the decedent could constitutionally be subjected to an inheritance tax. The inapplicability of that case to the case at bar is apparent from the opinion, which confessedly turns on the peculiarity of the Wisconsin law with respect to insurance policies, the court quoting, for example, from *Rawson vs. Milwaukee Mut. L. Ins. Co.*, 115 Wis., 641:

> "In Wisconsin, however, there has existed from early times a principle of the law of life insurance which is unique and at variance with the law in most of the states. This principle is that a person who insures his own life for the benefit of another, and pays the premium thereon, may (except a limitation by statute as to a married woman) dispose of the policy by will or in other manner

> not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein."

This view of the law of property is at variance not only with the law in most of the states, but is as variance with the law everywhere. See *1 Williston, Contracts,* Sec. 396; *Cooley, Insurance Briefs,* 3755-3757.

The court held that a statute giving a married woman rights in policies on her husband's life, of which she was beneficiary, did not prevent the husband's retaining a substantial interest in the policy. This is flatly opposed to the decisions on this point, treated at length in our brief, and can therefore afford no ground for holding this tax constitutional.

Judge Dickinson's Opinion

Girard Trust Co., vs. McCaughn, Collector, U. S. Dist. Ct. for E. D. Pa., Feb. 4, 1925. Sur rule for judgment.

Dickinson, J.:

The question raised is a demurrer question. It is the lawfulness of a tax exaction. It was admittedly lawful if certain property was properly included in the "value of the Estate" which measures the sum of the tax. This takes us to this property. What is it? The physical things were two pieces of real estate situate on Walnut

Street, Philadelphia. This real estate was under date of April 17th, 1916, conveyed by the then grantor (now the decedent) to the Girard Trust Company et al. Admittedly all interest, right or title of any kind which she had in the real estate was at an end when she died. She had made a will which following her death was duly probated. Of this will the plaintiffs are the executors. The will, however, deals in no way with this real estate for the reason, already stated, that all interest of any and every kind which the testatrix had formerly had in it ceased at her death. The tax, however, which her estate was required to pay was fixed by measuring it by the value of her estate as if she had died seized of this real estate and it had passed at her death as part of her estate.

This takes us back to the deed of conveyance. Aside from the taxing statutes and assuming that no such laws had ever been enacted, an analysis of this conveyance discloses the following as its effect in law and fact. What is commonly called the legal title passed to the grantees. This title, however, included no beneficial ownership in the grantees. Their title was that of trustees. The terms of the trust were (or included) that the title should be held and used so that the rents, issues and profits thereof should be paid to the grantor, or, at her election, she

should be permitted to occupy the premises as long as she might live. In short the grantor reserved or became the beneficial owner of a life estate in the real estate premises. This life estate was qualified or defined by the obligation of the life tenant or grantor to keep down encumbrances by paying for the upkeep of the premises if the income was insufficient for this purpose. The conveyance was made upon the "further trust upon the death of said grantor to assign, transfer and convey unto Emma Wood Hays * * * her heirs and assigns absolutely and in fee" the premises conveyed or any property which under the powers given the trustees might be substituted for the property conveyed. This means that the title to the real estate was held by the grantees in trust for the decedent, who held therein a particular estate for life, and for Mrs. Hays for an estate in remainder in fee.

The defense to the claim for the return of the tax payment is that the taxing Act measures the sum of the tax properly payable by the value of the decedent's estate plus the value of that of which the decedent had dispossessed herself in her life time which dispossession was not to become effective until her death. The conveyance of an estate in remainder after the death of the grantor or the conveyance of property reserving a life estate in the grantor is claimed to be (although

property which is not a part of the decedent's estate) nevertheless the kind of property which is to be included in the measure of the tax.

This takes us to the Act of Congress. Its pertinent language is that there is to be added to that of other property the value of "any interest" which the decedent had in any property "with respect to which" the decedent had "at any time created a trust in contemplation of or intended to take effect in possession or enjoyment at or after" the death of decedent.

The real difficulty in all cases of this general type is that words are used in wholly different senses. The word property is one of them. There are physical things and the concept of the right of property in things. The word "property" is indiscriminately used to convey the thought of either. When the word is used, in which of these two senses is it used? Inasmuch as this grantor reserved to herself the right and power to occupy as long as she lived the premises, the title to which she had conveyed away, it can be said with perfect truth that the grant to the remainderman was "intended to take effect in possession or enjoyment" *of the physical premises* "after the death" of the grantor. Inasmuch, however, as (ignoring the trust features) there was an absolute conveyance *in presenti* of an estate in fee in remainder to the grantee, it can be said with equal truth that

the interest or estate or "property" granted to the remainderman *at once* took effect in both possession and enjoyment and was not postponed until the death of the grantor. We do not see that the circumstance that the conveyance took the form of a conveyance of the legal title in trust nor that the trustees are directed to convey the legal title to the remainderman upon the death of the grantor works any real difference in results. Disrobed of all its form features, what the deed of conveyance did was to vest in the remainderman an estate in fee (that is all the estate and interest and all the right of ownership which a citizen of Pennsylvania can have in real estate) in remainder after a particular life estate had been carved out of it. The direction to the trustees to convey to the remainderman the legal title was under the law of Pennsylvania wholly superfluous. The trust was then a dry trust and the Statute of Uses made as effective a conveyance of the legal title as the trustees could do. When and indeed before the trustees made the contemplated conveyance it had already been made by the law. The Act of Congress does not, however, use the word "property" of common speech, but the word "interest," which is a word of legal import and a word of art. What was the "interest" which (before the grant) the grantor had in the real estate premises? Her

"interest" or estate was a fee simple, the full and absolute ownership. This gave her several rights of property. One was to possess and enjoy the physical premises for life or as long as she chose; another was to part with her ownership for a consideration if she so chose; another was to pledge it for a loan, and still another was to transmit it to her heirs or to devise it to whom she chose. All of these rights, except only the first, she granted absolutely and irrevocably to another. The grant was not *in futuro,* but *in presenti.* What she granted was real estate. This is not a thing but a right, interest or estate in land and what has become so far incorporated with land as to be a part of it. The possession and enjoyment of this estate or interest was immediate and not postponed to the time of the death of the grantor because admittedly the estate conveyed was a vested interest.

These distinctions are so well known and indeed so obvious that they must have been in the legislative mind. The thought at once obtrudes that if Congress had meant that for which the defendant contends it could have been and would have been unmistakably expressed. What is expressed is, as already quoted, "any interest." Here the "interest" was in land. Land in its law phase is not a corporal, physical, tangible thing. It is a concept—the concept of the right to appro-

priate a described portion of space. It is associated, of course, with material things which have some more or less permanent relation to this space. What is commonly called ground is one of them. Brick and mortar in the form of a building reared upon the ground is another. Almost any thing in the form of what is called personal property may (coupled with the concept of a fixture) be thus associated with and in this sense become incorporated with the concept of land. The land would remain if everything upon the ground were razed and removed. It would remain even if it were possible in some cataclysm of nature that the very ground itself should disappear. So it is with the "possession and enjoyment" of any "interest" in land. This "possession and enjoyment" may be and commonly is unconnected with any physical contact with the material thing. The physical thing itself is divisible by lines of cleavage in any direction. The right, estate or interest is likewise divisible. Whatever the interest is it passes at the time of the grant whenever it is what is called vested and the grantee is in the "possession and enjoyment" of the right, although he may not touch the thing to which the right relates. This is true of this remainderman. She never received anything more than passed to her by the grant. She could not have been given anything more in what she

had by any deed or will or other instrument of conveyance. She could, of course, have been granted something else as, for instance, this particular estate for life, but this would have been another "interest" in the real estate. There is not merely a distinction but a real difference between the transfer of an interest and the ending of it by its own limitations. Under the facts of this case this particular life estate ended with the life of the grantor, but in no real sense did it pass to the remainderman. It no more added to what the remainderman already had than the ending of the term of a lease adds to the estate or interest of the owner of the real estate. It is, of course, true, that there is an accompanying or incidental practical result or consequence of the death of the life tenant which may be and usually is of benefit to the remainderman, just as the "falling in" of leases may be of benefit to the owner. This is not, however, always even the practical result. If rentals were higher when the rent was reserved than at the expiration of the lease, the landlord owner might well regret the close of the term. So also when (as here) the life tenant had assumed the obligation to keep down encumbrances by paying taxes and other current charges, the remainderman might under some conditions be worse off by the ending of the life estate. The expression "land poor" is often more

than a phrase. It may be a truth as well as a fact. What is an "interest" in land is a question of land law which is determined hereby the law of Pennsylvania. That under the land law of the State the "interest" of this remainderman was a vested interest, the "possession and enjoyment" of which passed to her before the death of the life tenant is undoubted. A sufficient citation is the case of

Houston's Estate, 276 Pa., 330.

It must, however, be conceded that this is not altogether the question now presented. The question rather is what did Congress mean to be the measure of this tax? Did it mean that when an interest was created which did not pass to the grantee until the death of the grantor, this should be included in the measure of the tax or did it mean that whether an interest passed by the grant or not, the thing in which the estate was given should be included if the grantor reserved a life estate to himself or herself? The conclusion indicated is that if Congress had meant the latter, it would have said so.

Two other features have been brought into the discussion. It happened in the instant case that the remainderman died before the life tenant and this "interest" of the remainderman figured in the measurement of the tax which her estate paid. Another fact is that they died within five

years of each other. These features we pass without comment.

It only remains to inquire whether the conclusion indicated is in accord with the decided cases. Houston's Estate (*supra*) is of course not authoritative upon the tax question before us. It has none the less great informative value.

We have been referred to a number of cases, some of which we do not deem to be in point; others turn upon the meaning of a statute in respect to whether what has passed to a grantee is to be viewed from the standpoint of its practical results affecting the physical enjoyment of the subject matter of the grant or whether it is to be viewed from the standpoint of the legal estate or "interest" which has passed. These latter cases are helpful but not authoritative. *Houston's Estate* (*supra*) is one of them. The cited cases are:

Todd's Estate, 237 Pa., 466;
Reish vs. Commonwealth, 106 Pa., 521;
People vs. Danks, 289 Ill., 542;
Vanderbilt vs. Eidman, 196 U. S., 480;
Blodgett vs. Union, 97 Conn., 405;
Schuh's Estate, 66 Mont., 50;
Fulham's Estate, 96 Vt., 308;
Masury's Estate, 51 N. Y. S., 331;
Douglas Co., 84 Neb., 506;
Keeney vs. Comptroller, 222 U. S., 525;
Safe Deposit vs. Tait, 295 Fed., 429;
Shukert vs. Allen, 300 Fed., 754.

In addition there is the T. D. case of *Mercantile vs. Hellmich.*

In some of these cases the grant was held to be testamentary in substantial effect and in others not. We are thus brought back every time from the perusal of any case to the effect of this deed of conveyance. The test applied in *Fulman's Estate* (*supra*) and the accompanying expression is very illuminating. It is whether the estate or interest or property or right which passed to the grantee "took effect independently of the death of" the grantor and whether the grantee had the uncontrolled right or power to dispose of his "interest" at any time after the grant. Such was the effect of the grant here in question.

We think the plaintiff may recover back the tax paid, but to give definiteness of date to the judgment none is now rendered, but formal judgment may be entered in accordance herewith.

JUDGE BREWSTER'S OPINION.

Coolidge vs. Nichols, Collector, U. S. Dist. Ct. for D. Mass., Jan. 28, 1925. Charge to the jury.

BREWSTER, J.

Gentlemen of the Jury:

This is an action of contract brought by the plaintiffs, as executors under the will of Julia Coolidge, late of Brookline, in this Commonwealth, against Malcolm E. Nichols, as Collector of Internal Revenue for the District of Massachusetts. The suit is brought to recover a sum of money paid to the collector by the executors under protest, in response to a demand for an additional tax assessed upon the estate of Julia Coolidge. The plaintiffs claim the estate is not liable for this additional tax.

In this case the only evidence before you is that included in the agreed statement submitted by counsel. None of the material facts are in controversy, therefore no issue of fact is presented. Rather, this is a case where it becomes necessary for the Court to determine as a matter of law whether, upon these facts, the plaintiffs are entitled to recover, and if so in what sum. The amount involved is considerable, and the questions of law calling for consideration

involve the construction and validity of an Act of Congress. I have, therefore, given much thought to the arguments and briefs of counsel, have examined the authorities submitted, and have reached certain conclusions which I will undertake to state as clearly as I may.

Since the disposition of this case depends upon the determination of questions of law rather than issues of fact, I shall depart somewhat from my usual practice in jury trials and elaborate somewhat the reasons upon which these conclusions are based.

From the undisputed evidence, it appears that on July 29, 1907, Julia Coolidge joined with her husband. J. Randolph Coolidge, in an instrument of transfer whereby she and her husband transferred and conveyed to trustees named certain real and personal property. The trustees on the same day duly executed a declaration of trust respecting the property so conveyed, together with all accumulations and accretions and all property substituted for the original fund, which trust provided that the trustees should pay the net income,—three-sevenths to Julia Coolidge and four-sevenths to J. Randolph Coolidge "so long as they both live and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following

persons, who are children of said J. Randolph Coolidge and Julia Coolidge, viz.: J. Randolph Coolidge, Jr., John Gardner Coolidge, Archibald Carey Coolidge, Harold J. Coolidge and Julian N. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distribution in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share."

On April 6th, 1917, Julia Coolidge and J. Randolph Coolidge joined in another written instrument whereby they transferred, conveyed and assigned to J. Randolph Coolidge, Jr., John Gardner Coolidge, Archibald Carey Coolidge, Harold J. Coolidge and Julian N. Coolidge, in equal shares, all their interest in said trust fund, and all their right to receive the income therefrom, including additions thereto and any accrued income which had not already been paid over to them, and the trustees by said instrument were requested and directed to pay the income to said five children in accordance with the assignment.

On May 18th, 1917, Julia Coolidge executed two deeds whereby she conveyed to the five sons

already named two certain parcels of real estate, one situated in Boston and the other in Brookline. The deeds were in statutory short form of deeds with warranty covenants obtaining in Massachusetts and were recorded on May 18th and May 19th, 1917, respectively.

At the time these deeds were given, the grantees named therein executed and delivered a lease covering each of the properties conveyed which, in all material respects, were identical except as to description. Each lease was for the term of one year, and the rent reserved was at the annual rate of $1.00. Each lease contained the usual covenants found in the form commonly used in Massachusetts and contained also these pertinent provisions:

> "This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contract at least one month before the end of the original term or any renewal thereof."

Both parcels of real estate conveyed by the deeds were for many years owned by the decedent in her own right and occupied by her and her husband as places of residence. When the leases were made it was understood by the parties that, should the lessees desire to continue

to occupy the residences on the leased premises for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the life of the lessees or either of them.

The conveyance to the trustees and the conveyances of the Boston and Brookline real estate were not bona fide sales for a fair consideration in money or moneys' worth within the meaning of the provisions of Acts of Congress to which your attention will be presently directed.

Julia Coolidge died January 6th, 1921, leaving a will duly admitted to probate in the County of Norfolk in this Commonwealth. The plaintiffs are executors of that will. Mrs. Coolidge left a gross estate, exclusive of the property to which I have called attention, of over $180,000.00, and a net estate of over $100,000.00. The Commissioner of Internal Revenue increased the gross estate by adding thereto $432,155.35, the value as of the date of the death of Julia Coolidge of that part of the trust property which was deemed to have been conveyed by her in trust, although, as a result of changes in investment, much of the property originally received by the trustees was not held by them in specie at the time of her death. The Commissioner of Internal Revenue also included in her gross estate $272,300.00, being the value at the

time of her death of the property conveyed by the two deeds already referred to.

As a result of this action on the part of the Commissioner of Internal Revenue, an additional tax was assessed against the estate, with interest amounting to $36,799.38, which sum the plaintiffs paid under protest June 8th, 1923, and plaintiffs' claim for a refund having been duly filed and having been denied by the Commissioner of Internal Revenue, this suit is brought to recover the sum paid with interest from June 8th, 1923.

The ultimate questions to be determined are these: Did the Commissioner of Internal Revenue have a right to include in the gross estate of the decedent:

(a) The value at the time of her death of the property held by the trustees under the declaration of trust heretofore mentioned, and

(b) The value of the Boston and Brookline real estate conveyed by the decedent to her five sons by the two deeds aforementioned.

In the Revenue Act of 1918, Congress imposed a graduated estate tax upon the transfer of the net estate of every decedent dying after the passage of the act. The tax was to be measured by the value of the net estate, which was to be determined by deducting from the

gross estate certain sums and charges not now necessary to enumerate. The important provisions of the law are those which define and limit the value of the gross estate for the purposes of the tax. These provisions are as follows:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *"
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

It is claimed by the Government that the value of both the property conveyed in trust and the real estate conveyed outright came within

the scope of this section as transfers made or trusts created with the intention that they should take effect in possession or enjoyment at, or after, the death of Mrs. Coolidge. I do not understand that it is claimed here that there was any completed gift *inter vivos* made in contemplation of death, and if there was such a claim the transfers having been made more than two years prior to the death of Mrs. Coolidge you would not be justified in finding that they were made in contemplation of death in the absence of any affirmative evidence tending to show that they they were so made.

It follows, therefore, that if the value of this property, or any of it, is to be included in the gross estate, it is because the facts support the contention of the Government that the transfers were intended to take effect in possession and enjoyment at or after the death of the decedent.

It becomes necessary, therefore, to determine whether (1) the transfer in trust, and (2) the outright conveyances of real estate, were intended to take effect in possession and enjoyment after Mrs. Coolidge's death.

I do not have much difficulty in reaching a conclusion respecting the deeds of the Boston and Brookline real estate, and I will first consider the claims of the parties respecting those transfers.

The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

The leases, executed the same day, were for one year or any renewal thereof, but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the terms of the lease. If it could be said that the grantees did not come into full possession and enjoyment of the estate at the time of the conveyances—and I am inclined to the opinion that they did—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property, including the right of disposition. They had a right to sell the property, subject to the lease, and had all rights incident to ownership. There was here a gift completed during the lifetime of the donor. The Act of 1918 did not purport to tax such gifts.

I have reached the conclusion, therefore, that, respecting the property conveyed by the deed, the facts of this case do not bring the property within the reach of the statute and that the Commissioner of Internal Revenue was without authority to include the value of it as a part of the gross estate. I, therefore, give the following instructions, as requested by the plaintiffs: The real estate referred to in the second count of the declaration was not a part of the net estate of Julia Coolidge within the meaning of the Revenue Act of 1918.

The plaintiffs also claim that the transfer in trust was not one to take effect in enjoyment and possession after death within the scope of the act, and, therefore, the value of the property transferred should not have been included.

In the first place, it is necessary to inquire into the nature of the estate arising as a result of the transfer of July 29th, 1907, and the assignment of April 6th, 1917. The effect of these instruments was to divest Mrs. Coolidge of all interest in the property, the sons becoming, in effect, equitable owners in fee, subject only to the possibility that if a son died during the lifetime of the parents, or the survivor of them, his share would go to the next of kin. The interest of the sons, therefore, was not a contingent in-

terest, but rather a vested interest liable to be divested by death before the death of the survivor of the parent. They would not, however, come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it, until the terminataion of the trust, and by its terms the trust was not to be terminated until on or after the death of the decedent.

But the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, retaining no interest therein which would cease upon her death.

If I understand correctly the contentions of the plaintiffs, it is because of this fact that I am asked to instruct you, as a matter of law, that the property held in trust and referred to in the first count of the declaration was not a part of her "net estate" within the meaning of the Revenue Act of 1918. I think, however, that this request requires me to place a construction upon the provisions of Section 402 (c) somewhat too narrow. This appears when we consider the nature of the tax and the fact that the real question here is whether the value of the property so transferred shall be included in the total valuation which furnishes the measure of the tax. The tax is not laid upon the property transferred

nor upon the transfer. The tax has been held to be on the right to transmit or on the transmission at the beginning. The decedent, having left an estate which is transmitted upon her death, it has become taxable and, in determining the amount of tax which the estate shall pay, the statute expressly provides that there shall be included in the measure of the tax the value of property "to the extent of any interest therein of which the decedent has at any time made a transfer or in respect to which he has at any time created a trust in contemplation of, or intended to take effect in possession or enjoyment at or after his death."

The term "intended to take effect in possession or enjoyment at or after his death" and the term "in contemplation of death" had both been frequently the subject of judicial definition, and it may be assumed that in drafting the act Congress had in mind these definitions. We find that the courts had held that a transfer in trust similar to the one before us in this case, where the donor had parted with all his interest in property that was to be held in trust until on or after the death of the donor, was a transfer to take effect in possession or enjoyment on or after death. Although the income was payable to the sons, the intention of Mrs. Coolidge obviously was that the principal of the trust fund should not

vest in full possession and enjoyment until after her death.

It is pointed out that we are not now dealing with a tax on legacies or successions; that the tax is laid, not on the right to receive property upon death, but on the right to transmit it upon death, and it is therefore argued that, unless the decedent had some interest in the property, the transfer of which is sought to be included, it has no place in the valuation upon which the tax is to be computed; that this case should be distinguished from those cases where the Courts have deemed transfers similar to the one before us, subject to legacy and succession taxes. I am unable to discern any distinction in principle. If a transfer is one to take effect in possession and enjoyment after death, it may be reached under a statute imposing an estate tax. Granting, as we must, that Congress has power to levy a tax upon the net estate of a decedent, it may adopt any reasonable measure of that tax. Admittedly, it is entirely reasonable to measure the tax by the value of the property transmitted by will or by intestate laws, and I do not think it can be said to be unreasonable to measure the tax also by the value of property of which a decedent during his lifetime has made a disposition which partakes of the nature of a testamentary disposition. In such a case the reason-

ableness of the measure would not depend on whether the decedent had reserved any interest in the property which would cease upon his death. A completed transfer, *inter vivos,* made in contemplation of death, leaves no interest in the grantor. Whether the transmission be by will, by intestate laws or by transfers, to take effect on or after or in contemplation of death, the transmission bears in each case a reasonable relation to the event of death.

I am of the opinion, therefore, that the trust created by Mrs. Coolidge was a transfer to take effect in possession or enjoyment at or after her death within the meaning of the Act of 1918, and that the value of the transfer should be included in her net estate unless the retroactive provisions expressly incorporated for the first time in the Act of 1918 are held to be beyond the power of Congress to enact. This act provides that the value of the property so transferred shall be included, whether such transfer or trust is made or created before or after the passage of the Act.

The plaintiffs, in effect, ask me to say to you that these provisions are unconstitutional and void so far as they apply to the property transferred in trust by this decedent.

This request gives rise to the most difficult question of law found in this case, and one,

which I confess, is not entirely free from doubt. A court of first instance, I take it, should be reluctant to set aside as beyond the constitutional authority of Congress a purpose clearly declared. On the other hand, we are dealing with a law imposing the burden of taxation and the authority of Congress cannot be extended by implication. In view of the construction which I have put upon the act, the rights of the parties to this litigation cannot be settled without disposing of plaintiffs' request.

You have before you a situation where the decedent during her lifetime, and at a time when no tax was imposed on the transfer had entirely divested herself of all interest in the trust property which was included by the Commissioner of Internal Revenue in the gross estate. It was a completed transaction. All interests in the property had vested in others.

We have, therefore, an attempt on the part of the Government to exact an estate or indirect tax computed upon the value of property which did not constitute a part of decedent's estate, but concerning which, at a time when it was not taxable, she had made a transfer that did not take effect in full possession and enjoyment until after her death. I am of the opinion that the express terms of the Act providing the standard

by which this tax is to be measured embraces such property. The constitutional question presented is whether it lies within the power of Congress to adopt a criterion which would extend to such property transferred under such circumstances.

It has been stated that the nature of the excise or indirect tax forbids retroactive operation; that to exact a tax upon the privilege of consummating a transfer after it is completed leaves no choice in the tax payer and the tax becomes an unavoidable and absolute demand, thereby losing its essential characteristics as an excise or indirect tax, and becomes in effect a direct assessment upon the property itself simply because of ownership, and as such is unconstitutional unless apportioned among the states.

Ordinarily, a tax which cannot be shifted or the payment avoided is deemed a tax upon the holder thereof in respect to his ownership of property, and, therefore, a direct tax; but after a careful examination of the authorities on this point I am not prepared to state it as my opinion that Congress has not authority to give retroactive effect to a law providing an indirect tax.

If these express retroactive provisions now

under consideration are to be deemed unconstitutional, as applied to the facts before us, it would seem to be rather upon the ground that the attempt was an unreasonable and arbitrary exercise of the taxing power.

The power of Congress to provide the measure of a tax laid upon a legitimate object is far-reaching and must be upheld unless it is wholly arbitrary and unreasonable. What is the test of reasonableness? I gather from the cases and from the brief filed by the Government that the reasonableness of the classification turns upon the question of whether the transfer sought to be included bears any reasonable relation to the net estate of the decedent.

It is the contention of the Government that, although the defendant had, prior to the passage of the Act of 1918, parted with all her interest in the property, her death was a "generating source" of the possession and enjoyment, and that, therefore, a reasonable basis existed for including the value of the property in the measure of the tax. As I do not accept the premise as sound, I am unable to adopt the conclusion. Nothing passed upon the death of Mrs. Coolidge. Upon her death no interest ceased with corresponding accretion to the living. The only possible effect of her death would be to change the relationship between the

beneficiaries and the trust fund. I regard the transfers rather than her death as the "generating source" even of the enjoyment and possession.

From the agreed facts it must be admitted that the property sought to be included as a part of the decedent's estate belonged to others at the time of her death. Clearly, there must be some limitation to the power of Congress to exact a tax on one measured by property of another. I take it the Government would not seriously contend that an estate tax could be levied upon the estate of A, to be measured by the value of B's property, when neither the property of B, nor the manner of its acquisition bore any reasonable relation to the subject matter of the tax.

I am unable to perceive on what grounds it could be successfully claimed that the transfer in question, or the property transferred, could be said to bear any reasonable relation to the thing taxed. If, at the time of her death, the decedent had some interest in the property which terminated by reason of said death, or if, at the time the transfer was made, it was taxable, a different situation would arise. In the case before us neither of these conditions exist. The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the

power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death because both are transfers in the nature of testamentary dispositions and could be easily resorted to for the purpose of evading the tax. I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer if completed before the effective date of the law. In every case of transmission by will, intestate laws or transfers to take effect after death or in contemplation of death, a power, right or privilege has been exerted or exercised. When one has availed himself of this privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax, parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable. Such arbitrary inclusion of property of others has been held in other jurisdictions invalid as unconstitutional.

It has been held that a state possesses no authority to tax remainder, or reversionary, interests created by deed or will prior to the enactment of the law imposing the tax on the theory that state legislatures are without power to destroy or impair the value of vested interests. It has never been suggested that the powers of the state to impose inheritance tax was inferior to that of the federal government. It is true that the statutes which have been held unconstitutional for this reason have imposed succession rather than estate taxes. The conclusions reached, therefore, would not be controlling, but would be significant, I think, upon the question of reasonableness of classification.

I do not find that the precise question here presented, and with which I have undertaken to deal somewhat at length, has ever been passed upon by our court of last resort. The inferior courts seem not to be in accord. I am fully aware of the importance of the issue raised in its effect upon the revenues of the Government and for that reason have been led to give most careful thought and study to the helpful briefs filed in the case. As a result, I have reached the conclusion that the retroactive provisions of the Act of 1918, so far as they apply to a transaction entirely completed before the passage of the Act, are unconstitutional and void and that,

therefore, the action of the Commissioner of Internal Revenue in including as a part of her net estate the property conveyed in trust by Mrs. Coolidge is without authority.

It follows from what I have said that the plaintiffs are entitled to the instruction already referred to, namely,—That if the Revenue Act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the 1st Count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

The exaction of the payments referred to in the 1st and 2nd Counts of the Plaintiffs' Declaration being without authority I say to you, as a matter of law, that upon all the evidence the plaintiffs are entitled to recover the sum of $36,799.38, with interest at the rate of 6% from June 1, 1923, to the date of verdict, which counsel agree amounts to $.............................

The 1st, 2nd, 3rd, 7th, 8th, 9th and 10th requests for instructions submitted by plaintiffs are consistent with this charge, and I accordingly give instructions as requested. In view of my conclusions, it becomes unnecessary to consider the 4th, 5th, 11th, 12th and 13th requests. The 6th request I deny.

Of the defendant's requests for instructions, the 4th is consistent with what I have said, and is therefore granted. All other requests are denied.

You will, therefore, by order of Court, return a verdict for the plaintiffs in the sum of $40,417.98.

FILED
APR 18 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM 1924, No. 681.

C. G. LEWELLYN, formerly Collector of the United States Internal Revenue for the Twenty-third District of Pennsylvania,

Plaintiff-in-Error,

against

ADELAIDE H. C. FRICK, HELEN C. FRICK, CHILDS FRICK, *et al*, etc.,

Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF FREDERICK GELLER AND RUSSELL L. BRADFORD AS *AMICI CURIAE*, AND ON BEHALF OF THE FARMERS LOAN AND TRUST COMPANY AS TRUSTEE UNDER A TRUST INDENTURE MADE BY WILLIAM WALDORF ASTOR ON MAY 25, 1916.

FREDERICK GELLER,
RUSSELL L. BRADFORD,
Amici Curiae.

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SUBJECT INDEXED.

SUBJECT: PAGE

Facts 1

Points of Argument Stated.............. 4

POINTS OF ARGUMENT:

FIRST: The Revenue Acts of 1918 and 1919 are not retrospective so as to apply to rights acquired under insurance policies prior to the enactment of the Act of 1916 5

SECOND: A tax upon property rights vested at the time of the enactment is an absolute and unavoidable demand, and a direct tax 8

THIRD: A Federal Estate Tax which is measured by the value of the property vested in others, cannot be imposed, nor can such property rights be subjected to tax 20

FOURTH: Taxation of vesting in possession of property rights vested before the enactment is unconstitutional 31

FIFTH: Taxation of property rights vested prior to the date of enactment is unconstitutional 45

List of Cases Cited in this Brief:

	PAGE
Anderson's Estate, 85 Pa. 202	34
Billings *v.* United States, 232 U. S. 261	15, 45
Blair *v.* Herold, 150 Fed. 199	8
Blount *v.* United States, unreported	53
Brushaber *v.* Union Pac. R. R. Co., 240 U. S. 1	14, 49
Carpenter *v.* Penn., 58 U. S. 456	42
Chanler *v.* Kelsey, 205 U. S. 466	10
Chase *v.* United States, 222 Fed. 593	49
Cahen *v.* Brewster, 203 U. S. 543	42
Commonwealth *v.* Wellford, 114 Va. 372	14
Coolidge *v.* Nichols, unreported	50
Curley *v.* Tait, 276 Fed. 840	43
Dawson *v.* Kentucky Distilleries, 255 U. S. 288	14. 35
Ebersole *v.* McGrath, 271 Fed. 995	7
Eidman *v.* Martenez, 184 U. S. 578	8
Entwistle *v.* Travellers Ins. Co., 202 Pa. 141	34
Eury *v.* State, 72 Ohio 448	14
Ex Parte Milligan, 4 Wall. 2	55
Flint *v.* Stone Tracy Co., 220 U. S. 107	12, 15
Gould *v.* Gould, 245 U. S. 151	8
Hamilton *v.* Kentucky Distilleries, 251 U. S. 146	17, 55
Holder *v.* Insurance Co., 77 S. C. 299	34
Hunt *v.* Wicht, 174 Cal. 205	14, 39
In re Heff, 197 U. S. 488	50
In Re Lyons Estate, 233 N. Y. 208	14
In re Voorhees, 193 N. Y. Supp. 168	34

PAGE

Kansas City Ry. Co. *v.* Botkin, 240 U. S. 226 14
Knowlton *v.* Moore, 178 U. S. 41 ....22, 23, 27, 28, 49, 56
Knox *v.* McElligott, 258 U. S. 547........ 6

Lacy *v.* State Treasurer, 152 Iowa 477.... 14
Levy *v.* Wardell, 258 U. S. 542............ 6
Lloyd *v.* Royal Mutual Life Insurance Co., 245 Fed. 162.......................... 34
Lynch *v.* Congdon, 1 Fed. (2d) 133........ 54

Matter of Carnegie's Estate, 236 N. Y. 517 54
Matter of Craig, 97 App. Div. 289......13, 39, 41
Matter of Davis, 149 N. Y. 539........... 57
Matter of the Estate of Henry R. Kunhardt, unreported 26
Matter of Hodges, 215 N. Y. 447.......... 26, 57
Matter of Lansing, 182 N. Y. 238......10, 14, 42
Matter of Lyon, 233 N. Y. 208............ 54
Matter of Parsons, 102 N. Y. Supp. 168.. 34
Matter of Pell, 171 N. Y. 48...........11, 13, 37
Matter of Seaman, 147 N. Y. 69.......... 11
Matter of Sloan, 154 N. Y. 109.......... 57
Matter of Vanderbilt, 172 N. Y. 69....... 13, 42
Maxwell *v.* Bugbee, 250 U. S. 525......... 29
Miller *v.* McLaughlin, 141 Mich. 425...... 14
Moffitt *v.* Kelley, 218 U. S. 400............ 43

Neary *v.* Metropolitan Insurance Co., 92 Conn. 488 34
New York Trust Co. *v.* Eisner, 256 U. S. 345 41

Potter *v.* Chambers, 63 Cal Des. 141...... 57
Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429......................12, 14, 47
Prout *v.* Starr, 188 U. S. 537............ 46

PAGE

State *v.* Safe Deposit and Trust Co., 132 Md. 251 14
State *v.* Probate Court of Washington County, 102 Minn. 268.......... 14
Shwab *v.* Doyle, 258 U. S. 529..........6, 7, 9, 58
Southern Railway Co. *v.* Green, 216 U. S. 400 .... 47, 56
Smietanka *v.* First Trust and Savings Bank, 257 U. S. 602.......... 7

Tylers Admr. *v.* Treas. and Receiver General, 226 Mass. 306.......... 31

Union Pacific R. R. Co. *v.* Snow, 231 U. S. 204 9
United States *v.* Amer. Sugar Refineries Co., 202 U. S. 563.......... 7, 9
United States *v.* Burr, 159 U. S. 78...... 7, 9
United States *v.* Cohen Grocery Co., 255 U. S. 81.......... 7, 55
United States *v.* Field, 255 U. S. 257..... 7, 8
United States *v.* Heth, 3 Cranch 399..... 6, 9
United States *v.* Russell, 13 Wall. 623.... 55
United States *v.* Wigglesworth, 2 Story 3 Bg 373 8
Union Trust Co. of San Francisco *v.* Wardell, 258 U. S. 537.......... 6

Wright *v.* Blakeslee, 101 U. S. 174........ 42
Wardell *v.* Blum, 276 Fed. 226............ 22

STATUTES QUOTED:

	PAGE
Revenue Act of 1918, Sec. 402 (b)........	5
Revenue Act of 1924, Sec. 302 (h)........	7
Revenue Act of 1918, Sec. 401	22

STATUTES CITED:

Revenue Act of 1918, Sec. 402 (c)........	6, 7
Revenue Act of 1924, Sec. 302 (g)........	7
Revenue Act of 1918, Sec. 402 (f)	7, 9, 21, 54, 61
Revenue Act of 1918, Sec. 402 (d)........	53
Revenue Act of 1918, Sec. 408	22, 57
Revenue Act of 1916, Sec. 202 (c)........	54
Revenue Act of 1864, 3 St. at L. 287......	42
30 St. at L. 448 (1898)..................	23

MISCELLANEOUS CITATIONS:

Cooly on Taxation.....................	30
Report of Ways and Means Committee, Report 942, 64 Congress, 1st Session......	40
Treasury Regulations 37, Revision Jan. 1921	40
37 Harvard Law Review, page 698........	41

Supreme Court of the United States,

October Term 1924

No. 681

C. G. Lewellyn, formerly Collector of the United States Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error, *against* Adelaide H. C. Frick, Helen C. Frick, Childs Frick, et al, etc., Defendants in Error.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae* and on behalf of The Farmers' Loan and Trust Company as Trustee under a deed of trust dated May 25th, 1916, made by William Waldorf Astor, deceased.

William Waldorf Astor died on October 18, 1919 leaving a gross American estate of approximately $1,323,706.69, upon which American gross estate the Executor thereof paid a Federal

Estate Tax amounting to $70,633.60. On May 25th, 1916, long prior to the enactment of the first Federal Estate Tax Act, the said William Waldorf Astor created a trust with The Farmers' Loan and Trust Company of New York as Trustee, by which trust indenture he transferred and turned over and gave away all the income from the said trust fund, and also all of the principal of the said trust fund to the sons of Waldorf Astor (his son) and to John Jacob Astor (another son of the trustor). However, he reserved the right to change the proportions of the income and/or the principal to which the said beneficiaries named should be respectively entitled. This reserved right, however, was conditioned upon his receiving the consent of the Trustee, which consent the Trustee had the absolute power to withhold or grant in its own discretion. He did change the trust by amending the same by deed so as to provide for the payment of certain taxes and so as to provide for a larger share to his son John Jacob Astor than was to be paid to the sons of Waldorf Astor (another son of the grantor). The value of this trust fund on the day of his death as fixed by the United States Internal Revenue Bureau was $20,010,833.68.

He subsequently made, in 1919, other trusts, and the United States Internal Revenue Bureau, notwithstanding that the estate consisted of gross assets amounting to only $1,323,706.69, assessed a Federal estate tax against The Farmers' Loan and Trust Company as Executor of the American Will of William Waldorf Astor, and also against it as Trustee under the said deed of trust dated May 25th, 1916, and against it as Trustee under certain other deeds of trust,

in a sum exceeding the amount of the gross estate of the said decedent, and which tax amounted to $15,961,321.34, of which sum $4,947,-234.68 was computed by including as a part of the gross estate of the said William Waldorf Astor the said trust property composing the trust fund created May 25th, 1916. This sum, together with the sum assessed against the estate, of $70,633.60, has been paid.

Suit has been instituted in the United States District Court for the Southern District of New York for the recovery of the tax imposed against, and paid under protest and duress by, the said Trustee.

The point involved in the case at bar, of *Lewellyn* v. *Frick*, as to the right of Congress to impose upon the Executor a tax measured by the value of the property or property rights belonging to others than the decedent or his estate, or to tax property or property rights already vested, or transfers already completed, either against the estate or the vested owners, to some extent comprehends one of the questions of law, as well as the questions of constitutionality of the law, involved in the action of The Farmers' Loan and Trust Company as Trustee under the said deed of trust of May 25th, 1916 against Frank K. Bowers, Collector of Internal Revenue for the Second District of New York. This is our justification for asking the court's and counsel's permission to intervene and file this brief *amici curiae*.

The facts in the case at bar are clearly set out in the pleadings and in the brief of counsel for the defendants in error. That brief as well as the decision of the lower court show too plainly to admit of elaboration here, and demonstrate,

that the insurance policies in suit are property and property rights of the beneficiaries, in which the Executors or the estate of the decedent have no interest, and can have no interest. Therefore, taking it as proved, that insurance policies vest by contract a property right in the beneficiaries named therein upon the issuance of the policy, we shall discuss the questions of law as well as of constitutionality in the following order:

First: That the Revenue Act of 1918, effective February 25, 1919, was not retrospective in terms so as to apply to property and property rights acquired under insurance policies issued prior to the enactment of the said Act, and *a fortiori*, prior to the effective date of the Revenue Act of 1916, effective September 8, 1916; and,

Second: A tax upon property or property rights already vested at the time of the enactment of the law is not an excise tax, but is an absolute and unavoidable demand, and constitutes a direct tax; and,

Third: A death duty cannot be imposed by the Federal Government upon the estate of a decedent and measured by the value of the property vested in others, nor can the owners of property rights theretofore vested be subjected to the tax; and,

Fourth: A tax on the coming into possession of vested remainders or property rights created before the effective date of the Act is unconstitutional; and,

Fifth: The taxation of past transfers of property or of property rights vested prior to the

effective date of the Act of 1916 is repugnant to the Constitution of the United States, and is violative of those fundamental conceptions of free government that underlie all constitutional systems.

POINT I.

That the Revenue Act of 1918, effective February 25, 1919, was not retrospective in terms so as to apply to property and property rights acquired under insurance policies issued prior to the enactment of the said Act, and *a fortiori*, prior to the effective date of the Revenue Act of 1916, effective September 8, 1916.

Section 402 (f) of the Revenue Act of 1918 provides in part as follows:

Sec. 402.

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. . . .
> (f) * * * To the extent of the amount receivable by the Executor as insurance under policies taken out by the decedent upon his own life; *and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.*" (Italics ours.)

This language cannot be given a restrospective application so as to subject property and prop-

erty rights in insurance policies acquired and owned prior to the Federal Estate Tax Act of 1918. See *Shwab* v. *Doyle* (1922), 258 U. S. 529, 66 L. Ed. 747; *Union Trust Company of San Francisco* v. *Wardell, Collector,* (1922) 258 U. S. 537, 66 L. Ed. 753; *Levy* v. *Wardell,* (1922) 258 U. S. 542, 66 L. Ed. 758; *Knox* v. *McElligott,* (1922) 258 U. S. 547, 66 L. Ed. 760.

Section 402 (c) of the Revenue Act of 1918 purports to be retroactive in terms when applying to gifts or transfers made in contemplation of or intended to take effect in possession or enjoyment at or after death, for this sub-division provides: "(Whether such transfer or trust is made or created before or after the passage of this Act)". The Revenue Act of 1916 had no such language as that quoted, and this court held that the 1916 Act was not retroactive in terms, and thus could not be given a retroactive application. (See cases cited above.)

The provisions of the 1916 Act were changed in the 1918 Act as to gifts or transfers to take effect in possession or enjoyment at or after death, or made in contemplation of death, but the language of the 1918 Act as to insurance policies, though inserted in the law for the first time, was not retroactive as was the language as to gifts in contemplation of death. Therefore, it follows that the 1918 Act was not intended to be retroactive in so far as the tax upon vested property rights in insurance policies are concerned, unless the language is not susceptible of any other interpretation.

> "Words in a statute ought not to have a retrospective application unless they are so clear, strong, and imperative, that no other meaning can be annexed to them" (*United States* vs. *Heth,* (1806) 3 Cranch (7 U. S.) 399, 413, 2 L. Ed. 479, 483.).

See also

United States v. *Burr,* (1894) 159 U. S. 78, 82, 40 L. Ed. 82, 83;

United States v. *American Sugar Co.,* (1906) 202 U. S. 563, 577, 50 L. Ed. 1149, 1152.

The changes in Sec. 402 (c) were purposeful and could not be interpreted as an elucidation and clarification of the 1916 Act. This rule of statutory construction the court applied to the same taxing acts as are now before this court, in referring to another clause similarly inserted in the Act of Congress of September 8, 1916 and of the Act effective February 25, 1919. *United States* v. *Field* (1921) 255 U. S. 257, 65 L. Ed. 617, and *Shwab* v. *Doyle, supra; Smietanka* v. *First Trust and Savings Bank* (1922) 257 U. S. 602, 66 L. Ed. 391; *Ebersole* v. *McGrath,* (1920) 271 Fed. 995, 1001. The absence of express retroactive language in the 1918 Act in respect to life insurance policies was equally purposeful. The 1924 Revenue Act, Sec. 302 (h) in terms says that such insurance policies are subject to the tax in that the 1924 Act provides:

> Sec. 302 (h). "Sub-divisions (b), (c), (d), (e), (f), and (g), of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The language of Sec. 302 (g) of the Revenue Act of 1924 is identical with the language of Sec. 402 (f) of the Revenue Act of 1918. But the 1924 Act attempts to make it retroactive. Section 402

(f) of the 1918 Act was not intended to be, and was not, retroactive in terms. This change likewise is significant. It is a canon of statutory interpretation that taxing acts in case of doubt are construed most strongly against the taxing power and in favor of the taxpayer. See *United States* v. *Wigglesworth,* 2 Story 3 Bg. 373; *Blair* v. *Herold,* (1907) 150 Fed. 199, 201; *Eidman* v. *Martinez,* (1902) 184 U. S. 578, 583; *United States* v. *Field, supra,* and *Gould* v. *Gould,* (1917) 245 U. S. 151, 153. In the latter case this court said that:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

POINT II.

A tax upon property or property rights already vested at the time of the enactment of the law is not an excise tax but an absolute and unavoidable demand, and constitutes a direct tax.

Counsel for the defendants in error have covered in their brief and at greater length, the argument in respect of the prospective effect only of the Revenue Act of 1918 in its application to insurance policies. Therefore, this phase of the issue will not be further discussed. Assuming that the Revenue Act of 1918 in its application to rights acquired prior to the enactment of said

Federal Estate Tax Act has a retroactive application—which it has not,—and that such insurance policies are subject to the tax,—which they are not,—we shall address, as heretofore stated, our argument to the unconstitutionality of the provisions of the Act if such retrospective application can be read into or spelled out of the language of Section 402 (f) of the said Revenue Act of 1918. The facts in the case in suit demonstrate that the property rights had vested long prior to the enactment of said Federal Estate Tax Act. This is so upon the face of the facts, unless it be argued that a transfer of a remainder or of an insurance policy cannot be complete until it vests in possession. Later on in this brief, there will be discussed the question of the right of the Government to assess a tax upon the right of the owner of a remainder to take possession thereof, or of the beneficiary to take the proceeds of a policy which had been theretofore vested, but for the purposes of this point it is assumed that an insurance policy vests at once, and completely, a property right in the beneficiaries named.

Retroactive legislation, and particularly retroactive tax legislation is never presumed. It must be expressed in unambiguous and unequivocal terms, or the courts will give to the Act only a prospective application. See *Shwab* v. *Doyle, supra*; *United* v. *Heth, supra*; *United States* v. *Burr, supra*; *United States* v. *American Sugar Refining Co. supra*; *Union Pacific R. R. Co.* v. *Snow*, (1913) 231 U. S. 204, 213.

A property tax or a direct tax, because it violates no principle of justice, and because the thing itself is subjected to the payment of the tax may constitutionally, either by a State or by the Federal Government, be retroactively ap-

plied; this is because the thing itself is taxed, or the person himself is taxed. But the courts have held that an excise or indirect tax imposed retroactively even by a State, is a violation of the Fourteenth Amendment of the Constitution of the United States. This is because of the manifest injustice of a tax upon an event or an act or a happening already completed, and because in the final analysis, such a tax retroactively applied, loses its character of indirectness, or of an excise, and becomes a direct tax. A State may not impose a retroactive excise tax because it impairs the obligation of the contract, and because it is construed to be an attempt to appropriate property in a way which the Fourteenth Amendment forbids. See dissenting opinion in *Chanler* v. *Kelsey,* (1907) 205 U. S. 466, 480.

In *Matter of Lansing* (1905) 182 N. Y. 238, an attempt was made to tax a remainder interest which had been created in 1869 long prior to the enactment of the law of 1897, under which the State of New York sought to assess a tax. The court there stated on Page 247:

> "Where there is no transfer there is no tax, and the transfer made before the passage of the Act relating to taxable transfers is not affected by it * * *"

Probably the best exposition of the principle controlling the attempt of States to apply a death duty retrospectively, is set out in the well known dissenting opinion of Mr. Justice Holmes in *Chanler* v. *Kelsey, supra,* on page 480:

> "If * * * a given State tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a suc-

cession tax by the State Court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. * * * if there is no succession, or if the succession is fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York."

(Citing *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69)

These words are entirely appropriate in considering the Revenue Act of 1918 if we substitute in place of the word "succession" the words "property right in an insurance policy."

Mr. Justice Holmes there recognized that a tax upon succession which had been completed, (and the vesting of the property rights in these insurance policies in suit had been completed,) could not be a tax on the succession, (the insurance policies in the case at bar did not pass by succession but by virtue of contract); and it is equally true that to attempt to assess a tax upon a past transfer is not a tax on the transfer because there is no transfer upon which to fasten the tax. While the majority of the court decided that the State of New York could properly assess a tax on the exercise by will of a power of appointment, which power had been created prior to the passage of the tax law, the above state-

ment and principle of Mr. Justice Holmes was not and cannot be questioned.

What is the nature of a tax upon a past transfer, or the nature of a tax upon a property right in an insurance policy which had vested prior to the enactment of the law? It cannot be said to be a tax upon a transfer, or an event, or a happening, or the becoming vested with property, because these things had been completed. If it be a tax at all as distinguished from extortion and confiscation, it is a tax upon the property itself.

An excise tax by its very nature is a tax upon an event, a happening, an occurrence, or the privilege of doing some act, and from its very nature must be prospective only. One of the essential attributes of an excise tax is that there is in the taxpayer a choice or election to do or not to do something, which if done by him will be subjected to the tax. If there can be no election or discretion then the tax, whether it be specific or *ad valorem*, becomes an absolute and unavoidable demand. If the tax in its nature is an absolute and unavoidable demand it lacks one of the chief characteristics of an excise tax (*Flint* v. *Stone Tracy Company*, (1911) 220 U. S. 107, 151-2).

Chief Justice FULLER, in delivering the opinion of the court in *Pollock* v. *Farmers' Loan and Trust Company* (1894) 157 U. S. 429 at page 558 stated that:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon some-one else, *or who are under no legal compulsion to pay them*, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such es-

tates, and the payment of which cannot be avoided, are direct taxes." (Italics ours)

While we believe that a direct tax may be shifted as taxes on real property rented to another may be shifted to the tenant, we submit that if the tax cannot be avoided and is an absolute demand that it is essentially and of itself a direct tax.

It is impossible to conceive of an indirect tax that does not become an absolute and unavoidable demand if retroactively applied.

If the privilege upon which alone excises may operate has ripened into a right then Congress has no power to impose an excise tax, because the tax would then become a direct tax and must be apportioned in accordance with the requirements of the Constitution. A State, regardless of what name it gives to a tax, may not impose a retroactive excise upon a privilege, because this would be a violation of the Fourteenth Amendment to the Constitution of the United States, and this has been held time and time again by the State courts and by the Federal courts.

The State courts have repeatedly declared that transfer and inheritance tax laws, similar in character to the Act now in question, cannot apply retroactively even though the State can impose direct taxes unapportioned, and where possible to do so, the State courts have uniformly construed such legislation as having a prospective effect only, and where the language of the Act in question was unequivocal in referring to past transfers, the courts have declared such Acts to be unconstitutional in so far as they relate to such past transfers. *Matter of Pell* (1902), 171 N. Y. 48; *Matter of Vanderbilt* (1902), 172 N. Y. 69; *Matter of Craig*, 97 App. Div. 289, affirmed on

the opinion below 181 N. Y., 551; Matter of *Lansing*, (1905) 182 N. Y., 238; *In re Lyons Estate* (1922) 233 N. Y. 208; *Commonwealth* v. *Wellford* (1913), 114 Va. 372; *Lacey* v. *State Treasury* (1911) 152 Iowa 477; *State* v. *Safe Deposit and Trust Company* (1918) 132 Maryland 251; *Eury* v. *State* (1905) 72 Ohio 448; *Miller* v. *McLaughlin* (1905) 141 Mich. 425; *State* v. *Probate Court of Washington County* (1907), 102 Minn. 268; *Hunt* v. *Wicht*, (1917) 174 Cal. 205; 162 Pac. 639.

"Undoubtedly a tax may be *in form* a privilege tax and yet, *in substance*, may be a direct tax on property." (*Kansas City Railway Company* v. *Botkin*, 240 U. S. 226). A mere matter of nomenclature cannot change a direct tax on property into an excise tax. (*Dawson* v. *Kentucky Distilleries* (1922) 255 U. S. 288, 292.)

It is true, of course, that the court in *Brushaber* v. *Union Pacific Railroad Company* (240 U. S. 1), referring to the Pollock case, observed that income taxes generically were not necessarily only direct taxes, and held in that case that the income tax imposed by the Act of October 3, 1913 could apply upon the income received from the time of the adoption of the Sixteenth Amendment, (that is from February 28, 1913), and thus could be in part retroactive. However, the basis of the decision of this court in *Pollock* v. *The Farmers' Loan and Trust Company*, *supra*, was that income taxes in the final analysis are equivalent to direct taxes upon the property from which the income is derived. The court at page 626 quoted with approval the following statement from Hamilton: "What, in fact, is property, but a fiction without the beneficial use of it? In many

cases indeed, the *income* or *annuity* is the property itself." The *ratio decidendi* of the *Pollock case* is clearly to hold that income taxes are direct taxes, and the retroactive provisions of the laws applying to income taxes are not a precedent for the proposition that indirect imposts may be retroactive. Furthermore, the revenue measure upheld in the *Brushaber case* was adopted during the fiscal period covered by the tax, and was not, therefore, in the full sense retrospective.

As indicated in that case, an income tax has that characteristic of an "absolute and unavoidable demand" which is lacking in connection with ordinary excise taxes.

There is no substantial objection to the past being used as a measure for the imposition of excise taxes where an excise tax becomes an annual tax or becomes a tax for some stated period, the privilege which is sought to be taxed having been exercised subsequent to the enactment of the act as well as prior thereto. (See *Billings* v. *United States* (1914) 232 U. S. 261; *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107).

But this is not the case at bar. The decedent, Henry C. Frick, had by contract purchased insurance for the benefit of his wife and of his daughter. The rights of these beneficiaries had vested prior to the incidence of the Act. This was not a continuance of a privilege being exercised by the decedent, nor *a fortiori*, a privilege being exercised by the beneficiaries, after the enactment of the Act, because the interests of these beneficiaries became effective upon the issuance of the policy by the insurer. One event, one act, one happening, not a continuing process, had vested these beneficiaries with property rights. Nothing was availed of after the law was effective. If the

rights of the beneficiaries to the insurance policies were vested it would not be possible to reach that property for purposes of taxation by calling what in substance is a direct tax, an excise tax upon the transfer of title by the death of this decedent, when no title or interest was transferred by death. No more interest attached to these beneficiaries upon the death of this decedent than had attached in them long prior to the enactment of the Federal Estate Tax Act of September 8, 1916. The thing purchased was taken in hand by its owner.

The inability of the sovereign under the guise of an excise tax to impose an impost or toll upon the coming into possession of vested remainders or reversionary interests will be discussed later on in this brief at greater length. However, it suffices here to say that a tax upon the coming into possession of a remainder or a reversionary interest is a taxation of the property itself, and *a fortiori* is this true of the owner of an insurance policy taking possession thereof, and that is what the Constitution of the United States forbids without an apportionment of the tax in accordance with the provisions in Sections 2 and 9 of Article I of the Constitution of the United States.

If the government can, under the guise or cloak of an excise tax, impose retroactively a tax upon a privilege already exercised and *fait accompli*, then it may, under the same cloak, impose a tax on the transfer of all real property made ten years ago,—and if of ten years ago, of twenty years ago, and so on *ad infinitum*. This clearly would mean that Congress has the complete power to confiscate property. It would mean

that it would have the power to take property in peace times, which cannot be done in war times, without just compensation in violation of the Fifth Amendment of the Constitution of the United States.

Hamilton v. *Kentucky Distilleries,* (1919) 251 U. S. 146, 155;

United States v. *Cohen Grocery Co.,* (1920) 255 U. S. 81, 88.

If this statute be retroactive and, as such, constitutional, then every past transfer of every kind would be liable to taxation as would every purchase of property or of insurance.

> "The income of sales upon which income or direct taxes had been paid as for net gains or profits, may thus be subsequently transmuted into actual losses by an alleged excise tax for or upon the long past privilege or event of transfer or sale. As nearly all property has heretofore been acquired in some form of transfer, the power to tax past transfers would involve the power to reach all property by the most direct method of taxation."*

If this be taxation at all, it clearly is not an excise tax but a direct tax upon ownership.

The State courts have recognized the essential character of a tax upon past transfers, and have, therefore, held a retroactive transfer tax to be, not a privilege tax, for it clearly falls upon no right or privilege which the State could longer give, regulate or withhold, but in practical effect a direct tax, which attempts to take property with-

*Brief filed in the United States Supreme Court in the case of *Union Trust Company of San Francisco* v. *Wardell, Supra,* by counsel for plaintiffs-in-error.

out any consideration or justification and, therefore, without due process of law. These adjudications, quite aside from what they rule concerning limitations upon the taxing power of the several States, rest upon the fundamental conception that a tax upon a past transfer is in reality a tax upon past or present ownership of property as such, and, therefore, in no proper sense, an excise at all, but a direct property tax. If it be admitted that Congress cannot, at this time, pass an Act, regardless of the language or phraseology in which the Act is dressed, that imposes an excise tax upon the transfer of all property made ten or twenty years ago, then it must likewise be admitted that Congress cannot now impose a tax without apportioning the same, upon the vested interests of beneficiaries under an insurance policy purchased in full faith prior to the enactment of the law seeking to subject it to tax.

If there be nothing upon which to fasten a tax, there can be no tax. If there is some act or event necessary subsequent to the enactment of the tax Act before the property rights vest, then, of course the decisions of this court are to the effect that there is no impropriety in Congress making the measure of the tax dependent upon a period both before and after the passage of the Act. But this is not the case at bar. It is not the case involved in the trust instrument made by William Waldorf Astor in the month of May 1916. The insurance policies had vested and became vested property rights which cannot now be disturbed under the guise of excise taxes. Mr. Frick had divested himself of all interest in this property. The estate of Henry Frick had no interest in these life insurance policies; they were not subject to the payment of his debts nor were they part of the estate

distributable either by the Executor or by him. As this law was intended to lay the tax upon the privilege of transfer or upon the cessation of title, or otherwise Congress could not impose the tax without apportionment, it is a natural essential that the substance be there on which the law could operate. There must be a transfer or a cessation of title, or the happening of an event, or an act, in order that the tax may become operative. If there is no transfer or no cessation or change of title, there is nothing done, and the statute has no application. To strain the reasoning and assume that transfers previously made would come within the purview of the operation of the law would be not to tax a thing that is being done, or an act, or an event, or a happening, or a privilege that is being exercised, but would be to tax the property itself or the ownership thereof.

In the case at bar, the property right of these beneficiaries had been purchased. No transfer was made after the Act went into effect so far as these particular properties are concerned. Mr. Frick had no property right or interest to transfer. Nothing could be done by Mr. Frick to dispossess himself of the title of the property other than that which he had done, and nothing more could be done by the owners of these policy rights in order to have the title vested in them than that which had been done. For the court to now construe this Act retrospectively or to say that Congress has the power to impose a retrospective excise tax upon the happening of one event would be to say that the thing that has been done and the property rights which have been vested has not been done, and have not vested, and to conflict with the settled property laws of the State of Pennsylvania and of the State of New York.

After the passage of the Revenue Act of September 8, 1916 or the Revenue Act effective February 25, 1919, no discretion as to this property lay in Mr. Frick,—the transfers were complete. The ownership had passed. To now tax the transfer of this property right in the insurance policies would not be the imposition of an indirect tax but would be in effect a direct tax and one in which the decedent had no chance for escape or choice of the exercise of discretion, or would be a tax upon the beneficiaries or upon the property of the beneficiaries, because of ownership, either of which would be in violation of the Constitution of the United States in that this tax was not apportioned in accordance with the provisions and requirements of that instrument.

POINT III.

A death duty cannot be imposed by the Federal Government upon the estate of a decedent and measured by the value of the property vested in others; nor can the owners of property rights theretofore vested be subjected to the tax and the tax measured by the value of the property of a decedent.

If there is one principle of law and of constitutional right settled by the courts, it is this principle. It is as true of the Federal powers as those of the States. It is found inherent in the very concept taxation, and is a principle as old as taxation itself, or the organization of social compacts.

The amount of the insurance policies payable by contract to the beneficiaries named in the said policies was $474,629.52. This sum, and the right to the same, was the property of Adelaide H. C. Frick and Helen C. Frick. It was not the property of the decedent or his estate. It did not reach the hands of the Executors, was not liable for the payment of his debts, and was not subject to distribution by the law of the State of Pennsylvania, any other State or the United States. At the time the right to these insurance policies vested there was no law subjecting them to tax, or subjecting to tax the right of the beneficiaries to take possession of the property at the time or times named in the contracts of insurance.

Yet the Federal Government claimed that this property of the value of $434,629.52 ($474,629.52 being the amount of the policies subject to an exemption of $40,000. . . . Sec. 402 (f) of the Revenue Act of 1918), was property of the decedent, or property in which he had an interest, which was transferred upon his death. But the Government does not now claim that the property in these insurance policies belonged to the decedent or his estate, thus the government must admit that the proceeds of the insurance policies belong to the beneficiaries named therein and therefore, are not property of the estate. Under either contention the government has as its basis for the tax only Section 402 (f) of the Revenue Act of 1918. Counsel for the Government contends apparently that notwithstanding the property is that of the beneficiaries because of the provisions of Section 402 (f) the rate of the tax shall be computed as though Adelaide H. C. Frick and Helen C. Frick had no interest whatsoever in the property. This

is neither true as a matter of fact or as a matter of law.

The property was not a part of the estate of Henry C. Frick. He did not die possessed of these insurance policies nor does the Act attempt to tax such property, for the language of the imposing section of the Act reads:

> Sec. 401. "That * * * a tax equal to the sum of the following percentages of the value of the *net estate* (determined as provided in Sec. 403) is hereby imposed upon *the transfer of the net estate of every decedent dying after the passage of this Act*, whether a resident or a non-resident of the United States." (Italics ours.) See *Wardell* v. *Blum* (1921, C. C. A. 9th), 276 Fed. 226, 227, which held that the Federal Estate tax was "imposed on the transfer of the net estate of the deceased", and that therefore "the property upon which such a tax is imposed must, in truth, be the property of the deceased."

But the insurance policies here in suit were not a part of the net estate of this decedent. They were the property of others. This is fundamental and must be admitted. To tax them we must look elsewhere than the above provision for the authorization. It cannot be argued under a latitudinarian construction that the transfer of these insurance policies were testamentary in character because a vested right had been created in them prior to the enactment of any Federal Estate Tax Act. To tax the estate upon the value of these policies by adding to the assets of the estate the value thereof would be to tax it upon the value of property that did not belong to the estate. This the Federal Government cannot do. (See *Knowlton* v. *Moore* (1900), 178 U. S. 41; 44 L. Ed. 969.) Nor can the Federal Government in turn tax the beneficiaries of these policies, which it does in effect

attempt to do by virtue of Sec. 408 of the Revenue Act of 1918 which gives the Executors a right of recovery over and contribution from the beneficiaries of insurance policies, and measure the rate or the amount of the tax by the value of the property of the estate added to the value of the proceeds of these insurance policies. (See *Knowlton* v. *Moore, supra.*) The Executors or the estate have no more interest in the property of these beneficiaries than *A* has in the property of *B*, a stranger. These are separate property rights, and passed or vested by different rules of law and at different times, than the assets of the estate.

The language of the court in *Knowlton* v. *Moore, supra,* is too emphatic and unequivocal to admit of opening again for debate the question of this restriction upon the power of the Government to tax. Such a basis of taxation would clearly be an arbitrary selection if it would not indeed be confiscation and extortion.

Under the Act of Congress of June 1898 (30 Stat. at. L. 448, Chapter 448) in respect of the inheritance tax passed by that Act, the Government sought to impose a tax upon legacies and distributive shares of personal property inherited by legatees or distributees and to measure the rate of the tax, not by the property inherited or received, but by the value of the estate of the decedent. The construction of this statute came before this court in the case of *Knowlton* v. *Moore, supra.* In this case the constitutionality of the Act was made an issue. In order to uphold the constitutionality of this law, and to sustain and maintain the right of the Federal Government to impose a death duty (whether an estate or legacy tax) the court construed the law, in order to relieve it of its doubtful constitutionality, that the measure of the rate of the tax should be the value

of the property received or inherited by the legatee or distributee, and not the value of the property left by the decedent. Mr. Justice White delivered the opinion of the court, and said in respect of the right of Congress to impose a tax upon a beneficiary, measured not by the value of the property received, but by the value of all the property bequeathed, on page 76:

> "Granting, however, there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the Act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of *A*, which is only worth $1000, may be taxed, but that the rate of the tax is to be determined by attributing to *A's* house the value of *B's* house, which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to an hospital $10,000. The rate of tax would be 5%, and the amount of the tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeaths $10,000 to the same institution. The rate of tax would be 12½%, and the amount of the tax $1,250. It would thus come to pass that

> the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in one case more than twice the tax that he would in the other. In the arguments of counsels tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

While the court did not express an opinion in relation thereto, Mr. Justice White raised a doubt as to the validity of the law which would assess a tax upon the property of one and fix the rate of tax upon the value of the property of another, and stated on page 77 that:

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered, comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.
>
> It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The tax imposed by the Revenue Act of 1918 is a tax, by the token of this statement of Mr. Jus-

tice White, in approving the distinction drawn by Hanson in his work upon death duties, upon the interest which ceased by reason of death. If the tax is upon the interest ceasing at death and the rate of tax must be applicable only to the property right that ceased at death, then it follows inevitably that the property under the insurance policies belonging to Adelaide H. C. Frick and Helen C. Frick could not be subject to the tax and certainly the value of these property rights cannot be added to the value of the property of the decedent, title to which ceased at death, and the rate of tax applied against the two as a whole.

This is the law in the States, and it certainly will not be contended that the right of a State to control the devolution of property is inferior to such a right in the Federal Government. The Surrogates' Court of New York in the *Matter of the Estate of Henry R. Kunhardt*, decided March 6, 1925, held that a trust deed executed twelve (12) days before the death of the decedent was a gift made in contemplation of death, under the circumstances of the particular case. But the court held that: "The transfer took effect as of the date of the trust deed and not at the time of death. (*Matter of Schmidlapp*, 236 N. Y. 278; *Matter of Garcia*, 183 App. Div. (N. Y.) 712, 716.) The transfer should be computed separately on the property passing by the deed (*Matter of Cummings*, 115 Misc. (N. Y.) 276)." The appeal in this case was taken from the order of the appraiser for the State of New York who fixed a tax on the ground that the value of a transfer under such conditions has been added to the property passing by the will of the decedent, and thus taxed as a whole. To the same effect is the *Matter of Hodges*, 215 N. Y. 447, in which case the New York

Court of Appeals again recognized that a gift made *inter vivos,* as these insurance policies were made, were taxable at the time they were made and that the tax must be based upon the value of the property at the time of the transfer, if there were a law in effect subjecting such transfers to a tax at that time.

Such a basis of taxation as the government here contends for is arbitrary and unreasonable and results in gross inequalities and injustice. This is particularly illustrated in the case for which the undersigned appear in that the gross American estate of William Waldorf Astor amounted to only approximately $1,323,000, and yet the tax imposed against the estate, and collected from the trustees, amounted to more than $15,700,000. The estate had no more interest in the property of the trust, or the trust estate in the property of the decedent's estate, than the illustration used by Mr. Justice White of taxing *A* by attributing to his property the value of *B's* property.

The basis of calculating the tax and the rate applied results in the same invalid basis the court condemned in *Knowlton* v. *Moore, supra.*

It is conceivable, of course, that Congress could, under a gift tax, assuming the constitutionality of a gift tax, impose a tax upon the beneficiaries of insurance policies upon the value of the policies at the time of the transfer or gift, and apply the graduated rate to this separate property. But Congress has not imposed a tax upon the value of these life insurance policies at the time of the transfer of the same or the gift of the same but has assumed to impose a tax upon the value of these policies added to the value of the property of the estate, put the burden of the payment of the tax upon the executor of the estate, with a

right, under Sec. 408 of the Act, of contribution and recoupment from the beneficiaries of the policies. If this be a tax upon the estate or upon the title to property ceasing or passing at death, then the value of the insurance policies should bear no part of the tax. If the tax is upon the transfer of the insurance policies and the Act could be made retroactive so as to apply to the value of these policies, which cannot constitutionally be done we contend, then the rate of the tax would bear no relation to the value of the estate of the decedent, and the most for which the Government could contend would be that the graduated tax should commence at the lowest rates on this sum of $474,629.52 of insurance. But the statute does not impose a tax upon these insurance policies as of the time of their vesting property rights in the beneficiaries. Therefore, it follows that the result of the Government's contention, assuming that no vested right is being uprooted, and assuming that such a tax would not have the characteristics of an absolute and unavoidable demand, which constitute a direct tax, is that the estate is subject to a tax measured by property in which it has no interest, or in other words, *A's* property is subjected to a tax by giving to it the value of *B's* property. Or, the reverse, that the beneficiary is being taxed, which tax the law does not in terms impose, not upon the value of the property at the time of the transfer but upon the value of the property of the estate attributed to the value of the property of the beneficiaries of these insurance policies in addition to the value of the insurance policies. On either horn of the dilemma the Government impales itself upon the condemnation of this basis of taxation as set out by Mr. Justice White in *Knowlton* v. *Moore, supra.*

This basis of the measurement of the tax is not the basis of such a measurement as was upheld by this court in *Maxwell* v. *Bugbee,* (1919) 250 U. S. 525. The New Jersey taxing Act involved in that case did not include in what it actually taxed any property of the non-resident decedent which was in other States. But in the case at bar the Government seeks to have its measurement theory accomplish quite a different result. As stated above, it would add the value of the property transferred *inter vivos* to the value of that which passes at death (which it alleges is the only thing that is actually being taxed) and then would not only fix the rate by the total, but also apply that rate to the total itself, that is, to the sum of all the transfers.

The difference between the New Jersey tax and the tax now before the court, is illustrated by the following example.* A non-resident leaves property in New Jersey not specifically disposed of amounting to $100,000. The assets elsewhere not specifically disposed of amount to $900,000. The New Jersey taxing authorities compute what their tax would be if the entire $1,000,000 had been located in New Jersey and the decedent had been a resident. The rate thus obtained,—say, of 5%—is then applied only to the $100,000 of assets actually located in New Jersey and the tax accordingly fixed at $5,000. This is not the Government's contention in the present case and under the Act of 1918. Its contention is that a decedent dies possessed of assets amounting to $100,000, but fifteen years before his death he had transferred property amounting to $900,000, or had taken out life insurance policies to specific bene-

*Example taken from brief of counsel for plaintiff-in-error in *Union Trust Co.* v. *Wardell, supra.*

ficiaries before the act took effect in that sum. The Government adds the two together making a total net estate of $1,000,000 and fixes the rate of tax accordingly, which we may again say is at 5%. It would not, however, apply the 5% rate solely to the assets passing at death which would be a tax of $5,000, but applies the tax to the total amount of $1,000,000 and fixes the tax at $50,000. This indicates how oppressively the tax in suit operates, and how the tax liability of *A's* estate would be measured by the property belonging to third parties.

The result of this basis of the measurement of the tax in view of Sec. 408 of the law, is to subject the vested property owner of the insurance policies or her property to the payment of the tax due from the donor's estate upon the transfer of such an estate at the latter's death, which, of course, results in making the donee pay the former owner's tax. Such a procedure is not the exercise of taxation at all. (Cooley on Taxation, 7th Ed. P. 695.) It is plainly compelling one man to pay another's tax in respect of a matter in which he has no concern. The fact that the owner's property is the measure of the tax, even if it be true, is immaterial, for the Government's right to appropriate the owner's property, that is, the beneficiaries who owned the insurance policies, certainly cannot result from using his property as a standard or measure of an excise tax. If the Government does not use the property of the beneficiary of the insurance policy as a measure for the tax upon the estate, then it must impose the tax upon the owner of the property directly, and if it does this, this would clearly be the imposition of a direct tax solely by virtue of the ownership thereof.

We submit the measurement theory of the Government cannot be sustained. We submit further that the property of the decedent cannot be subjected to tax because the owner of other property has taken possession of that property, and we likewise submit that the property of the beneficiaries of the insurance policies cannot be subjected to the tax, if the policies vested prior to the enactment of the Act, merely because the donor has died.

POINT IV.

A tax on the coming into possession of vested remainders or property rights created before the effective date of the Act is unconstitutional.

A policy of life insurance is a contract. "The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. They are in no wise modified or increased at the time of the death of the insured." *Tyler Administratrix* vs. *Treasurer and Receiver General* (1917), 226 Mass. 306. The opinion of the court was stated by Chief Justice Rugg, and that Court held that the Massachusetts Inheritance Tax Act did not authorize the imposition of a tax on money paid to the beneficiary under a policy of life insurance. The point involved in this case was one of construction of the Massachusetts statutes but the opinion of Chief Justice Rugg is so exhaustive

and conclusive as to what a policy of life insurance is and as to the interest of the beneficiary in it that we quote as did the brief of defendants in error in the lower court from the opinion at length, page 307 *et seq.*:

> "A policy of life insurance is a contract. It is commonly a tripartite agreement, to which the parties are the insured, the insurer and the beneficiary. A policy of life insurance is a contract for a consideration paid, usually in money, in one sum or at different times during the continuance of the risk, which involves the payment of money or other thing of value by the insurer to the family, kindred, representative, or other designated beneficiary of the holder of the policy, conditioned upon the continuance or cessation of human life, or which involves a guaranty, assurance or pledge of an endowment or an annuity. *Commonwealth* vs. *Wetherbee*, 105 Mass., 149, 160. See St., 1907, c. 576, Sec. 66; *Curtis* vs. *New York Life Ins. Co.*, 217 Mass., 47. The rules applicable to the interpretation and enforcement of policies of life insurance are those which govern contracts. *Davis* vs. *New York Life Ins. Co.*, 212 Mass., 310. While speaking with technical accuracy, a beneficiary is not a party to a policy of life insurance and could not at common law maintain an action in his own behalf, yet he has an equitable interest in the policy and can maintain an action for his own benefit in the name of the personal representatives of the insured, and by statute is enabled to bring an action in his own name. *Campbell* vs. *New England Mutual Life Ins. Co.*, 98 Mass., 381, 400; St. 1907, c. 576, Sec. 73. The rights of the beneficiary are thus protected by the law and by the statute. The rights of the beneficiary attach at once upon becoming so designated by the terms of the contract. *Pingrey* vs. *National Life Ins. Co.*, 144 Mass., 374.

Where the beneficiary is the wife of the insured, her rights instantly vest upon a meritorious consideration. *Bailey* vs. *Wood*, 202 Mass., 562. It has been said that, apart from any statutory provision, the designation of a beneficiary in a policy of life insurance is in the nature of an executory trust for his benefit of which he cannot be deprived without his consent. *Boyden* vs. *Massachusetts Mutual Life Ins. Co.*, 153 Mass., 544, 546. Said Chief Justice Fuller in *Central Bank of Washington* vs. *Hume*, 128 U. S., 195, at page 206: 'It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries * * *. *Gould* vs. *Emerson*, 99 Mass., 154; *Knickerbocker Life Ins. Co.* vs. *Weitz*, 99 Mass. 157.' The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. They are in no wise modified or increased at the time of the death of the insured. * * *"

"The insured retains no ownership of that which has passed to the beneficiary under the contract. *A reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last.* [Italics ours.] Whatever the insured does in way of designation of a beneficiary takes effect forthwith. If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary. *Attorney General* vs. *Clark*, 222 Mass. 291. There is no fund in which he has an ownership which is the subject of his act in designating the beneficiary, as in *New England Trust Co.* vs. *Abbott*, 205 Mass., 279,

> and *State Street Trust Co.* vs. *Treasurer & Receiver General*, 209 Mass., 373. The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence until after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay to the beneficiary. So far as the insured is a 'grantor', to use the word of the statute, the only thing which he grants or can grant is an interest in a contract. So far as he can make a 'gift,' the only thing which he has to give is a right in a contract. By designating a beneficiary both the 'grant' and the 'gift', so far as either exist at all, take effect in enjoyment and possession at once. Such a relation does not by fair intendment come within the descriptive words of the statute as 'property * * * which shall pass * * * by * * * gift * * * made or intended to take effect in possession or enjoyment after the death of the grantor.' "

See also *Anderson's Estate* (1877), 85 Pa. 202; *Entwistle* vs. *Travellers Insurance Company* (1902), 202 Pa. 141; *Neary* vs. *Metropolitan Ins. Co.* (1918), 92 Conn. 488, 103 Atl. Rep. 661; *Holder* v. *Ins. Co.* (1907), 77 So. Carolina 299, held that the rights of the beneficiary vested as soon as the policy is issued and that the power to change beneficiaries does not include the power to cancel the policy. To the same effect see *Matter of Parsons* (1907), 102 N. Y. Supp. 168 (A. D.), where the court said the wife "obtains an immediate title right to enjoy the moneys when they become payable as death losses". Also *In re Vorhees* (1922), 193 N. Y. Supp. 168 (A. D.), and *Lloyd* vs. *Royal Mutual Life Insurance Co.* (1917), 245 Fed. 162 (Northern Dist. of Iowa).

All of the policies in suit had vested prior to said Federal Estate Tax Act. Some of the policies vested absolutely at the time of issuance, some vested in the beneficiaries at the time of the assignment of the same by the insured, some vested at the time of the assignment subject to being divested either by the insured changing the beneficiary or by the beneficiary predeceasing him. But in each instance there was a vested right of interest that could not be made subject to a subsequent excise tax law however directly expressed. This the courts have held, for to assess a tax upon the right to take possession is to lay a tax upon the property itself.

The court in *Dawson* vs. *Kentucky Distillery Co.* (1921), 255 U. S. 288, 65 L. Ed. 638 held that the government could not impose an excise tax of fifty cents on the withdrawal from bond of every gallon of whiskey. Mr. Justice Brandeis further stated that " 'The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value'. To levy a tax by reason of ownership on property is to tax the property." The court, therefore, held that the tax sought to be imposed was in fact and in law a direct tax and that it could not be sustained as it was not apportioned in accordance with the provisions of the Constitution relating to the imposition of direct taxes by the Federal Government.

If this court has recognized and held that to lay a tax upon the right of the owner of whiskey to take possession thereof is to lay a tax upon the whiskey itself, it follows inevitably that it must hold that to lay a tax upon the right of the vested

owner of an insurance policy to take the proceeds of the policy in accordance with the terms thereof is to lay a tax upon the insurance policy itself or its proceeds, or upon the owner thereof "solely by reason of ownership thereof". There is no peculiarity about insurance policies. They are definite property rights and have been recognized as such by the courts time and time again. It cannot be that the government's contention of the right to tax an insurance policy vested in the beneficiary is solely because the possession of the proceeds may occur subsequent to the enactment of the act seeking to tax the transfer of the rights in an insurance policy, because this would in effect and substance be taxing the thing.

There can be no real distinction between the taxing of a reversionary interest upon possession and the taxing of the taking of the proceeds of an insurance policy in accordance with the terms thereof and the right of a person to take possession of his whiskey after placing it in bond as required by law. If the government can assess a tax upon the right to take possession of a reversionary interest, it can under the guise of an excise tax lay a direct tax upon a large part of the real property in this country, for it can then impose a tax upon the right of a person to again take possession of his property after the expiration of a leasehold which he had granted in relation thereto, prior to the passage of such a law. Such a tax we submit the courts would not sustain.

The legislature of the State of New York passed an act in 1899 attempting in unequivocal terms to assess a tax upon property of remainders the title to which had vested prior to the enactment of the statute but which had not vested in

possession or enjoyment at the time of the passage of the Act. The courts were called upon to consider the validity under such an act in the *Matter of Pell* (1902), 60 A. D. 286 (affd. 171 N. Y. 48). The Appellate Division of the Supreme Court of New York came to the conclusion that the Act did not assess a tax upon the right of succession as the succession had already been completed, but that the tax could be upheld as direct tax upon property itself. The Court of Appeals of New York held the act invalid as a succession tax, and also that it was not a property tax—so hence invalid altogether. The Court of Appeals at pp. 55-6 said:

> "This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation.
>
> "The learned Appellate Division reached the conclusion that this amendment of 1899

was unconstitutional, and we agree with them in that regard. They have, however, sustained this legislation on the ground that it is a direct tax upon property and a legitimate exercise of the taxing power. In so holding that learned court uses this language: 'It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. Our conclusion, therefore, upon the whole case is, that if the tax sought to be imposed could only be supported upon the principle that it is a tax upon the right of succession, then there would be objections, among them constitutional ones, to its validity; but that with reference to the estate here involved, if the act can be construed, as with some misgivings we think it can, as a tax upon property, it is free from constitutional objections, and the tax may be upheld.'

"We are of the opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax.

"It would seem to be too clear for argument that the legislative intention in this regard was to deal with the act relating to taxable transfers and with nothing else.

"To say that the act was not an amendment of the law relating to taxable transfers of property is to contradict what plainly appears upon its face."

The decision in the Pell case was expressed with such positiveness and the reasoning is so clear and irrefutable that it has become the leading case in the country on this question and has been cited with approval and followed in each state in the Union where a similar issue has been

raised. It was expressly approved and adopted in California in *Hunt v. Wicht* (1917), 174 Cal. 205. Subsequently to the decision of the Court of Appeals in the Pell case the New York courts again announced the same principle in the *Matter of Craig*, (1904) 97 A. D. 289, affirmed on the opinion below by the Court of Appeals of New York, 181 N. Y. 551. The Appellate Division there said (pp. 291, 296):

> "It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent, or whether the instrument is to be regarded as conveying such remainders as gifts *inter vivos* or as gifts *causa mortis*. The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract. (Const. art. 1, Sec. 6; U. S. Const. art. 1, Sec. 10, subd. 1.) In other words, the appellants contend that at least as early as May 9, 188[illegible], they had acquired their rights by irrevocable deed; that such rights whether vested or contingent then constituted present property interests in future estates which were vested in the sense that they were secured to them by deed subject only to contingencies as to time and survivorship; that incident to the ownership of

such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment, being absolute and not merely privileged, could not afterwards be taxed by the State because of well-settled principles of constitutional law. I am inclined to the view that the contention is sound. In the discussion the appellants must be regarded on May 9, 1885, as being in the same position as they would have been in if the remainders had been acquired by purchase instead of gift, and it cannot be that the State can levy an assessment upon the right of a citizen to enjoy the fruits of a prior purchase which when made was wholly free from such an imposition. . .

"I do not lose sight of the fact that the tranfer tax is levied, not upon the property affected, but upon the right of succession. The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

The very essence of the Federal Estate Tax Act is that it is a transfer tax act and it was as such an act that it was reported to Congress by the Ways and Means Committee of the House of Representatives (Report 942, 64th Congress First Session, page 5). The Treasury Department has definitely stated in Treasury regulations 37, Rev. January, 1921, Promulgated under

Revenue Act of 1918, "the tax is not laid upon the property but upon its transfer from the decedent to others". The court upheld the right of the Congress to impose a graduated Federal estate tax, but in the case in which its constitutionality was upheld, *New York Trust Company* vs. *Eisner* (1921) 256 U. S. 345 the transfer considered occurred after the passage of the act. Therefore it was an excise on a vesting of property subsequent to the effective date of the act. Inheritance taxes are *per se* excises. It is only when they are retroactive that they lose this character. "Then at the time of the passage of the law there is no inheritance or transfer to be taxed and as, therefore, the law cannot place a duty upon a non-existent transfer of inheritance or estates, certainly it should not be distorted into some other sort of an excise where there is no present or future transaction to be called upon for revenue. In such a case, in substance, the statute places an assessment upon property itself." (37 Har. Law Rev. April 1924, page 698.)

This distinction is well expressed in *re Craig's Estate*, (1904) 97 A. D. 289 (affd. 181 N. Y. 551 without opinion). The court there said "The underlying principle which supports the tax is that such right [right to inherit] is not a natural one, but is in fact a privilege only, * * * but when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege. * * *"

Some courts have even taken the position, or certainly implied, that such retroactive excise statutes are void even though the prior transfer was merely a contingent one. See *Craig's Estate*

(*supra*), 292; *Matter of Lansing* (*supra*), 248; *Matter of Vanderbilt* (1902), 172 N. Y. 69.

We are familiar with the fact that the courts have upheld state inheritance taxes where the property had not been vested prior to the enactment of the act. The decision of this court in *Wright* vs. *Blakeslee* (1879), 101 U. S. 174, 25 L. Ed. 1048, under Section 127 of the Internal Revenue Act of January 30, 1864, 13 Stat. at L. 287 providing "that every past or future disposition of real property * * * by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate or the income thereof, upon the death of any person dying after the passage of this act, shall be deemed to confer upon the person entitled by reason of any such disposition a 'succession; * * *" upheld a tax upon the vesting in possession of "a bare contingent remainder expectant upon" the death of the precedent life estate. But the implication of the decision is that if the remainder had been vested prior to the enactment of the Act of 1864, and were not a mere contingent remainder, that the Act could not have been applied in that case.

This court also upheld the tax laid by the State of Louisiana under the provision of the law which sought to impose a tax "to be collected on all successions not finally closed and administered upon and all successions thereafter opened". But the court held that so much of the succession as had actually vested in possession was no longer in the process of administration and was not subject to the tax. *Cahen* vs. *Brewster* (1906), 203 U. S. 543, 51 L. Ed. 310. To the same effect is a decision of this court in *Carpenter* vs. *Penn.* (1854), 58 U. S. 17 How. 456 under a somewhat similar statute wherein it held that so far as estates were

held to be vested prior to the act the law was invalid and in so far as the estates were not vested the law was held valid. Referring to the Blakeslee case the U. S. District Court for Maryland in *Curley* v. *Tait* (1921), 276 Fed. 840, 843 said:

> "In Shwab *v.* Doyle [which had just been decided by the U. S. Circuit Court of Appeals in 269 Fed. Rep. 321] the case of Wright *vs.* Blakeslee, 101 U. S. 174, 25 L. Ed., 1048 was cited as authority for holding a similar statute retroactive. The act however construed imposed a tax upon the succession—that is upon the right to receive—and was levied upon what passed to the heir, devisee, legatee, distributee or successor and not upon the estate. *Knowlton* v. *Moore,* 178 U. S. 41-42 et seq. 20 Sup. Ct. 747, 44 L. Ed. 969. The distinction is neither pedantic nor technical, but as applied to the matter now in hand is in the highest degree practical."

This court also upheld in *Moffitt* v. *Kelly,* (1910) 218 U. S. 400, 54 L. Ed. 1086 the rights of the State of California to impose an inheritance tax upon the community property passing in possession to a wife upon the death of the husband after the passage of the law. The case has been upheld by the courts of California in that they upheld that the community right of a wife in the conjugal property was the right of an heir expectant and not a vested right.

The cases seem to turn upon whether the property was vested or contingent. Some of the courts as in New York hold that even if it be a contingent remainder that the state may not impose a retroactive excise tax. Therefore, if the states under the fourteenth amendment cannot impose a retroactive excise tax or a tax upon the coming into possession of vested interests or the taking pos-

session of property already owned, then it should equally follow that the power does not lie within the Congress to impose an excise tax upon the coming into possession of property already vested prior to the enactment of the act seeking to subject it to tax. This should be so whether we look to the fifth amendment of the Constitution as the remedy for the prevention of this impost or whether we consider such an attempt by the legislative body of government as without the pale of the concept of taxation and resulting in an exaction or confiscation in violation not of the taxing power of the government but in the violation of and an interference with vested rights. The result is the same whether the fifth amendment be a limitation upon the power of Congress to tax or whether the act of Congress is so unconscionable and so unjust as to be extortion and confiscation and not taxation. The act does not tax the coming into possession of vested rights, and the position of the Government in advancing such an argument is inconsistent with the other terms of the act because it is manifest that this theory does not take into account the attempt of Congress in the very same section to tax out and out gifts, that is, gifts (without any remainders or future interests) which were made in contemplation of death before the tax act was passed. Delivery of possession may actually have taken place many years before the enactment of the law but such gifts nevertheless are sought to be taxed according to the contention of the Government. Another theory urged by the Government at one time was that the act did not tax transfers at all but only the transfer of or succession to the assets possessed by the decedent at death and that it used the past gifts or transfers, namely, those made

in contemplation of death or to take effect in possession or enjoyment at or after death, or policies of life insurance issued prior to the enactment of the act and passing to beneficiaries merely as a measure of the tax. This theory is inconsistent with the others for it does not depend at all upon coming into possession; and should also be noted that, under it, no tax would be collectible if the decedent died without assets. But regardless of this theory as set out under Point III of this brief the Government could not impose a tax upon the coming into possession of property already vested and if it could—which it cannot—it could not measure the tax by the property owned by the decedent and that owned by others and upon the accumulated assets impose the highest graduated rate of tax.

This we repeat would not be taxation at all but would be an arbitrary selection and an exaction of the property of either the estate or of the owners of the insurance policies without just compensation.

POINT V.

The taxation of past transfers of property or of property rights vested prior to the effective date of the Act of 1916, is repugnant to the Constitution of the United States and is violative of those fundamental conceptions of free government that underlie all constitutional systems.

We contend, notwithstanding the observations of the Court to the contrary (*Billings* v. *United States, supra*), that the Fifth Amendment to the

Constitution applies to the whole Constitution, and that each and every portion thereof must be read in connection with that amendment. While the fifth amendment does not place an inhibition on the power of Congress to lay and collect taxes, nevertheless, it does require that the asserted tax laws shall not violate the provisions of the fifth amendment, and deprive persons of their property without due process of law, or take their property without just compensation. As this Court has said in speaking of the various portions of the Constitution "each and all of them shall be respected and observed". (*Prout* v. *Starr* (1903), 188 U. S. 537-544.) Without regard, however, to whether the fifth amendment places any restraint upon the taxing power of Congress, we must, nevertheless, recognize that there are restraints upon that power and that Congress may not under the cloak of a taxing statute, arbitrarily take property for public use without compensation.

Regardless of whether the fifth amendment does or does not place a restraining hand upon the power of Congress in relation to taxation, we may assert without fear of controversy, that the Courts have always recognized that a taxing statute to be valid, must be equitable in its nature and general in character. This requisite of a tax law has sometimes been characterized as "uniformity." It is true that the Court has definitely determined that the provision of the Constitution requiring that excise taxes shall be uniform has only a geographical significance, nevertheless, the Court has recognized that there must be an element of uniformity in all tax laws because the concept of tax comprehends some element of uniformity. Mr. Justice Field in his opinion in

Pollock v. *Farmers' Loan and Trust Company,* (1895) 157 U. S. 429, at page 599, stated:

> "The inherent and fundamental nature and character of a tax is that of a contribution to this support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.
>
> This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

Again we find this requirement for equality and uniformity, which is inherent in any tax law, pointed out by Mr. Justice Day in *Southern Railway Co.* v. *Greene* (1910), 216 U. S. 400, 417:

> "While reasonable classification is permitted without doing violence to the equal protection to the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just rela-

> tion to the thing in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection it has been said cannot be justified by calling it classification."

The requirement of uniformity is in the very essence of constitutional law, and although the Constitution grants to Congress powers of taxation, they are grants of lawful power with the inherent restrictions which distinguish a "government by law" from a "government by men" who usurp arbitrary power. Whether these inherent restrictions are expressed in the uniformity clause or are found in the nature of the taxing power or are a part of the concept of tax, is immaterial. The important thing is the fundamental principle, which is a part of each, that arbitrary discrimination cannot be reconciled with valid and just laws.

Attorney-General Olney and Assistant Attorney General Whitney, in their arguments in the income tax cases, admitted this inherent limitation on the general taxing power. See 157 U. S. at page 507, and also 157 U. S. at page 474, where Mr. Whitney said:

> "There is, however, a certain degree of uniformity involved in the very word 'tax'; a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution. * * * A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the Constitution of Pennsylvania provides that taxes shall be

'uniform on the same class of subjects'; while the Supreme Court of that State has decided that this requirement is merely declaratory. Kitty Roup's case, 82 Penn. St. 211."

Chief Justice White, while insisting that the fifth amendment did not circumscribe the power of Congress in relation to taxation, nevertheless recognized that there were limitations upon such power (*Knowlton* v. *Moore*, 178 U. S. 41.) In the excerpt from his opinion which we have heretofore quoted, he said that "aside from express constitutional restrictions" arbitrary taxation would "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Again in *Brushaber* v. *Union Pacific R. R. Co.*, (1916) 240 U. S. 1, 24, he further stated:

"* * * this doctrine [that the fifth amendment is not a limitation upon the taxpayer] would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so *arbitrary* as to constrain to the conclusion that *it was not the exertion of taxation* but a confiscation of property; that is, a taking of the same in violation of the fifth amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." (Italics ours.)

Again we find this statement in *Chase* v. *United States*, (1915) 222 Fed. 593, 596:

"No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either

> seriously impaired or destroyed. *Choate* v. *Trapp*, 224 U. S. 665, 670, 677, *56 L. Ed.* 941; *Jones* v. *Meehan*, 175 U. S. 1; 44 L. Ed. 49; *In re Heff*, 197 U. S. 488, 504; 49 L. Ed. 848."

The confidence of a people in the security of their property and person, free from legislative encroachment is their confidence in organized society and this is the foundation of the different states and governments of the world. This is an essential principle of governments and is elemental in the building up of governments and the peace, prosperity and happiness of their citizens.

In a late case arising under the very act in suit decided on January 28, 1925, Judge Brewster of the United States District Court for the District of Massachusetts, held in *Coolidge et al.* v. *Nichols*, Collector (unreported —see Corporation Trust Company, War Tax service 1925, paragraph 835, page 247 et seq.), that even the terms of Section 402 (c) of the Revenue Act of 1918 which are definitely retroactive cannot subject to the tax property vested prior to the enactment of that act whether the property had vested in possession or not. The court said in reference to that section of the Revenue Act of 1918 and to transfers that had been completed prior to the enactment of the Act that

> "I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer if completed before the effective date of the law. In every case of transmission by will, intestate laws or transfers to take effect after death or in contemplation of death, a power, right or privilege has been exerted or exercised. When one has availed himself of this

privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax, parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable. Such arbitrary inclusion of property of others has been held in other jurisdiction invalid as unconstitutional.

It has been held that a state possesses no authority to tax remainder, or reversionary, interest created by deed or will prior to the enactment of the law imposing the tax on the theory that state legislatures are without power to destroy or impair the value of vested interests. It has never been suggested that the powers of the state to impose inheritance tax was inferior to that of the Federal government. It is true that the statutes which have been held unconstitutional for this reason have imposed succession rather than estate taxes. The conclusions reached, therefore, would not be controlling but would be significant, I think, upon the question of reasonableness of classification.

"I do not find the precise question here presented, and with which I have undertaken to deal somewhat at length, has ever been passed upon by our court of last resort. The inferior courts seem not to be in accord. I am fully aware of the importance of the issue raised in its effect upon the revenues of the Government and for that reason have been led to give most careful thought and study to the helpful briefs filed in the case. As a result, I have reached the conclusion

> that the retroactive provisions of the Act of 1918, so far as they apply to a transaction entirely completed before the passage of the Act, are unconstitutional and void and that, therefore, the action of the Commissioner of Internal Revenue in including as a part of her net estate the property conveyed in trust by Mrs. Coolidge is without authority. It follows from what I have said that the plaintiffs are entitled to the instruction already referred to, namely,—That if the Revenue Act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the 1st Count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States."

The pertinent fact in this case was that Mrs. Coolidge with her husband, J. Randolph Coolidge in 1907 conveyed property to trustees, which trustees on the same day duly executed a declaration of trust respecting the property so conveyed, which trust provided that the trustees should pay the net income therefrom three-sevenths to Julia Coolidge, and four-sevenths to her husband, so long as they both lived, and pay the whole of the net income to the survivor, and upon the death of the survivor to distribute the trust property equally among the named children of the said Julia Coolidge, or if any of the said remaindermen should predecease the said Julia Coolidge and her husband, J. Randolph Coolidge, then to those who would be entitled to take his intestate property. On April 6, 1917, and after the enactment of the Revenue Act of 1916, Julia Coolidge and J. Randolph Coolidge joined in another instrument whereby they transferred, conveyed and

assigned to the said children in equal shares all their interest in the said trust fund, and all their right to receive the income therefrom. The Judge observed that the effect of the instruments of 1907 and of April 6, 1917,

> "was to divest Mrs. Coolidge of all interest in the property, the sons becoming, in effect, equitable owners in fee, subject only to the possibility that if a son died during the lifetime of the parents, or the survivor of them, his share would go to the next of kin. The interest of the sons, therefore, was not a contingent interest but rather a vested interest liable to be divested by death before the death of the survivor of the parent. They would not, however, come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it, until the termination of the trust, and by its terms the trust was not to be terminated until on or after the death of the decedent."

The Court held that the assignments did come within the purview of the Act, but, nevertheless as stated above, held that the Act was unconstitutional in that the property had vested prior to the enactment of the Act.

The Court of Claims has held in the case of *Blount* v. *United States*, indicated on March 3, 1924, and which case is now pending before this court, Docket Number 442, File Number 30407, that property seized by the entirety, under the Revenue Act of 1916 is not subject, upon the death of either of the tenants by the entirety, to the payment of a Federal Estate Tax. There is no difference between the language of the Revenue Act of 1916, Sec. 202 (c) and the language of the Revenue Act of 1918, Sec. 402 (d). Neither are in terms

retroactive, and the language of the Revenue Act of 1918 applying to insurance policies is similarly not in terms retroactive.

The Circuit Court of Appeals for the Eighth Circuit in *Lynch* v. *Congdon*, 1 Fed. (2d) 133 decided on August 5, 1924, held under the 1916 Act that a joint estate created before the enactment of the Revenue Act of 1916 was not subject to the tax upon the death of either of the tenants.

If these two decisions are sound, then it follows inevitably that property sought to be subjected to the tax under and by virtue of Sec. 402 (f) of the Revenue Act of 1918, cannot be reached by that Act. It is obvious that a joint estate, or an estate by the entirety, has a closer relation to the assets and value of the property of the decedent that does pass at death than an insurance policy vested in ownership in others prior to the enactment of the Act. In a joint estate or an estate by the entirety, as the seisen is *per my et per tout*, the decedent actually has an interest in the whole of the property up to the date of his death. This is not so of an insurance policy already vested, because the interest of the insured in the insurance policy ceased upon the designation of a beneficiary other than the estate of the insured.

The State courts have held that tenancies by the entirety seised before the passage of the Act were not subject to the State Inheritance Tax. See, *Matter of Lyon*, (1922) 233 N. Y. 208, *Matter of Carnegie's Estate*, (1923) 236 N. Y. 517. These tenancies are fictions of law. Nevertheless they have become so embedded in English and American jurisprudence that such estates are vested property rights which cannot be affected even by such practical legislation as taxation. There is no element of fiction about an insurance policy. It is a

decidedly practical matter. It is simply a contract. A contract vests at once the parties with property rights. While there is no express inhibition in the Constitution against the Federal Government impairing the obligation of a contract, there is a limitation upon the power of the Government to impair the obligation of the contract under the guise of taxation if that taxation is a retroactively imposed excise, or is a tax not apportioned in accordance with the provisions of the Constitution in that regard.

If the basis of the taxation will result in inequitable consequences and in unjust and oppressive exactions, and the result of its operation may be a confiscation, the very bases of social compacts and constitutional systems are impinged upon and outraged. There seems to be no substantial doubt but that the war powers conferred upon the Government by the Constitution are as broad and as essential to the life of the Government as the taxing powers granted to it under the same instrument. Yet, it is the established doctrine of this court that even the war power of the Federal Government is subject to the guaranties contained in the Constitution, including those imposed under the Fifth Amendment. *Ex parte Milligan*, 4 Wall. 2, 121-7; *United States* v. *Russell*, (1871) 13 Wall. 623, 627; *Hamilton* v. *Kentucky Distilleries Company*, (1919) 251 U. S. 146, 155, 156; *United States* v. *Cohen Grocery Company*, (1920) 255 U. S. 81, 88. If there were any power which should not be subject to the operation of the guaranties of the Constitution, and of the principles underlying the organization of governments, in favour of due process of law, it would be natural to suppose that the exigent and essential war power would be that power.

"But, as the authorities cited above show, not even the apparent and imperative demands of war have been deemed sufficient warrant for placing the war power above the guaranty to the citizen of due process of law and the protection of his property against being taken for public use without just compensation."*

But whether the exaction of property from the citizen under the guise of taxation is a violation of the Fifth Amendment or not, if the attempted and alleged tax law results in an arbitrary selection and not a classification, that law will not be deemed to be taxation at all. (See *Southern Railway Co. v. Green, supra.*) The law in suit does amount to an arbitrary selection in its operation as sought to be applied in the case at bar or in similar cases.

If two persons at the same time, prior to the enactment of the law, receive identical gifts or are beneficiaries under identical insurance policies taken out at the same time and under the same conditions, and one donor chances to die after the passage of the law, and the other dies before the passage of the law, one recipient is subjected to the tax and the other allowed to go free. After the issuance of the policies neither had any larger or greater property right than the other. The generating source of the tax is not death, which must be the generating source of an inheritance tax imposed by the Federal Government, (*Knowlton v. Moore, supra*) but is the transfer, or the act, or the happening. It is idle to say that the generating source of a gift *inter vivos* is the death of a person who may die many years after the gift was made. But the application of this law sought to

*From brief of counsel for plaintiffs in error in, *Union Trust Company v. Wardell, supra.* Page 92.

be employed by the Government violates and outrages the sense of justice, of fairness, and of equality and of classification in that the basis of the tax is the value of the property theretofore vested, and owned by others, placed upon the same by the government as of the day of the death of the decedent. The property may have had a relatively small value at the time of the transfer *inter vivos,* or the creation of the property right in the donee or beneficiary. Through the transmutation of time and changed conditions, the property may have so enhanced in value that the assets of the decedent, which he had sought to reserve for the bounty of his family, may be entirely wiped away and obliterated. The donor would have no control. He would not be able to recall the gift or the transfer. He could even in lifetime watch with amazement and actual fear the rising value of the property he had given away prior to his death knowing that a new value would be placed on this property and knowing that his estate would have to pay the tax on the same. While the Revenue Act of 1918, Sec. 408 gives a right of contribution to the estate against the beneficiaries of insurance policies, we take it for granted, as heretofore set out in this brief, that under no possible construction could the tax be imposed upon or collected out of the beneficiaries of these insurance policies.

It has been recognized by the State courts that transfers *inter vivos* were taxable in accordance with the law as it existed at the date of the transfer. *Matter of Sloane* (1897), 154 N. Y. 109; *Matter of Davis,* (1896) 149 N. Y. 539; *Potter* v. *Chambers,* 63 Cal. Des. 141. In the *Matter of Hodges,* (1915) 215 N. Y. 447, the New York Court of Appeals again recognized and stated that gifts *inter vivos* were taxable when made, and that the

tax must be placed upon the value at the time of the transfer. To tax transfers otherwise is a selection and not classification; is taxing property upon a basis or value which has no relation to the thing taxed or privilege exercised. It is fundamental that the basis of tax must have some relation to the thing or act taxed. If this were not so then the necessity for classification, or the use of that term as a limitation upon all taxation, would be an empty phrase. We submit that all excise tax laws must of their very nature operate prospectively. We submit that a tax law operative as this law is sought to be applied, is a violation of the inherent and fundamental conceptions of free government, which, as this court has said, underlie all constitutional systems.

Mr. Justice McKenna in *Shwab* v. *Doyle, supra,* after quoting Story to the effect that "Retrospective laws are, indeed, generally unjust; and as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact," on page 534 said:

> "There is absolute prohibition against them when their purpose is punative; they then being denominated ex post facto laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.
>
> The Act of 1916 is within the condemnation."

The court also said that in the absence of a definite declaration that the statute is retroactive and the absence leaves the statute a double sense

that the courts must reject the retroactive operation. Mr. Justice McKenna then said on page 535:

> "The circumstances of this case impel to such selection. If retroactivity be accepted, what shall mark its limit? The circuit court of appeals found the interrogation not troublesome. It said: 'Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say twenty-five years to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years' prima facie provision.' In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelped by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax; that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition of the tax.
>
> The construction of the Government is more tenable though more unrestained. It accepted in bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends the statute to 'transfers of any kind made in contemplation of death *at any time whatsoever* (italics ours) prior to September 8, 1916.' The sole test, in the opinion of that officer is 'the date of the death of the decendent.' He prefixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times, to the demands of revenue. In this there is much to

allure an administrative officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the act to relieve from its exactions to satisfy the demands of revenue.

If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had the purpose it did declare it. In the Revenue Act of 1918 [February 24, 1919, 40 Stat. at L. 1097, chap. 18, Comp. Stat. 6336¾c] it re-enacted Sec. 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed whether 'made or created before or after the passage of' the Act. And we cannot accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by the defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it."

CONCLUSION.

We therefore, respectfully submit, (1) That Section 402 (f) of the Revenue Act of 1918 is not retroactive in terms and if it can be applied at all should be applied only prospectively and, (2) If interpreted to be retroactive in terms it cannot tax the beneficiaries of these insurance policies upon their taking possession of their own property, and (3) If so interpreted it cannot tax the estate upon property in which the estate had no interest, or measure a tax by the value of the property of

others, and (4) If the statute be interpreted so that either the beneficiaries of the policies or the estate can be so subjected to the tax, that then the Act is unconstitutional in that it is a direct tax and unapportioned, and in that it will be the taking of private property without just compensation, and in that it would be a taking of property without due process of law, and in that the result wrought is an arbitrary and unjust selection and not a classification.

Respectfully submitted,

Frederick Geller,
Russell L. Bradford,
Amici Curiae.

[14199]

14

IN THE

Supreme Court of the United States.

No. 681

C. G. LEWELLYN, FORMERLY COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE 22ND DISTRICT OF PENNSYLVANIA,

Plaintiff in Error,

vs.

ADELAIDE H. C. FRICK, ET AL., EXECUTORS,

Defendants in Error.

BRIEF OF ISAAC B. LIPSON. AMICUS CURIAE.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

TABLE OF CONTENTS.

		PAGE
	Statement of cause in which *amicus curiae* is interested	1
	Subject discussed in this brief	2
I.	The federal estate tax an excise tax on right to transmit property by decedent	3
II.	Gross estate; per centum; by whom payable	4
III.	Liability of beneficiaries of trust	4
IV.	The nature of the trust estate which is included in the "gross estate"	5
V.	Upon what the tax is in fact levied	7
VI.	The purpose and intent of the act	9
VII.	The disparity as between estates	10
VIII.	The disparity between beneficiaries of trusts	13
IX.	The true rule respecting classification. The section violates the Fifth Amendment	15
X.	The federal estate tax is a tax upon heirs and legatees and is a direct tax	15
XI.	The doctrine that income and excess taxes may be retroactive. Its limitations	17

The brief of defendants in error makes reference to all cases upon which this argument is based, or which are referred to herein.

This brief makes reference to the following cases:

On the nature of the tax:

New York Trust Company v. Eisner, 256 U. S. 345	3, 9
Knowlton v. Moore, 178 U. S. 41	3
Cases cited from 25 R. C. L. 236	4

On the applicability of the section if there be no estate:

Levy v. Wardell, 258 U. S. 542..... 8

On the question of the constitutionality of retroactive succession taxes:

The report of Schwab v. Doyle (258 U. S. 529), 26 A. L. R. 1461, containing a collection of all cases on that subject in comprehensive note 17

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To the Honorable the Judges of the Supreme Court of the United States:

Now comes Isaac B. Lipson, of Chicago, Illinois, and prays leave to file his appearance as *amicus curiae* in said cause and says: That he is attorney for the executor of the estate of Anna B. Austin, deceased, of Chicago.

That Anna B. Austin died in the year 1922 In the year 1903 she executed an irrevocable deed of trust transferring securities having a value of $1,600,000 to be paid to her two children after her death. The Government proposes to levy an estate tax of around $160,000 based on the inclusion in the "gross estate" of the value of the securities transferred in trust in 1903. The estate left by her is less than the proposed tax and

the legatees are the surviving husband and certain relatives and friends other than the two children who are beneficiaries of the trust. The proposed tax will exhaust the estate leaving nothing for legatees and leaving a balance to be paid by the beneficiaries of the trust.

Respectfully,

Isaac B Lipson

BRIEF OF AMICUS CURIAE, ISAAC B. LIPSON.

THIS BRIEF IS CONFINED TO A DISCUSSION OF THE CONSTITUTIONALITY OF SECTION 402 (c) OF THE FEDERAL ESTATE TAX ACT IN SO FAR AS IT PURPORTS TO BE RETROACTIVE.

(In the case at bar insurance policies are involved, but many of them were transferred prior to the passage of the act; the plaintiff below claims that these policies were *property* transferred prior to the enactment, the transfer to go into possession and enjoyment after the death of the donor, and therefore the question involved as to such policies is similar to and probably identical with transfers coming within the purview of Section 402 (c).)

We contend:

(1) That the tax is a direct tax levied in violation of Article 1, Section 9, Subdivision 4 of the Constitution.

(2) That it takes property of the taxpayer without due process of law in violation of the Fifth Amendment.

I.

THE FEDERAL ESTATE TAX: AN EXCISE TAX ON RIGHT TO TRANSMIT PROPERTY BY DESCENT.

The Federal Estate Tax is an excise tax. It is "a tax on the right to transmit or on the transmission at its beginning." *New York Trust Co. et al.* v. *Eisner*, 256 U. S. 345.

In that respect it differs from the previous act which assessed the tax against the heirs and legatees; it was a succession tax and was said to be a tax on the right to receive. *Knowlton* v. *Moore*, 178 U. S. 41.

An excise tax is a tax "upon the performance of an Act, engaging in an occupation or enjoyment of a privilege." 25 R. C. L. 236 and cases there cited.

II.

GROSS ESTATE. PERCENTUM. BY WHOM PAYABLE.

Under Section 402 (c) a tax is assessed upon a principal sum designated as the "gross estate." This principal sum is arrived at by adding to the net value of the true estate the value of all sums transferred or trusts created, intended to take effect in possession or enjoyment after the decedent's death.

It is a graduated *advalorem* tax and the percentum is determined by the two factors, the value of the trust estate and the value of said transfers in trust.

The tax, however (by Sections 406 and 407), is required to be paid by the executor and he cannot recover any part of it back from beneficiaries under the trust. He must exhaust, if need be, the entire estate for the payment of the tax. (Sec. 406, Regulation Article 81.)

III.

LIABILITY OF BENEFICIARIES OF TRUST.

If the entire estate is not equal to the tax upon the estate, then the remainder of the tax becomes a lien upon the "gross estate" (including the property held in trust or delivered to beneficiaries) and the transferee, trustee, and each beneficiary is personally liable for such tax to the extent of the value of the property transferred to him. (Section 409, Regulation Article 86.)

The Government may elect which one or more of such

persons it will hold for the tax. The person so elected must pay to the full amount received by him, but such person (other than the executor or the administrator) may thereafter sue each other person similarly subject to the tax for his proportionate share. (Sec. 409.)

Example: X dies. A tax of $150,000 is assessed. The estate amounting to $25,000 is paid over in full to the Government. A, B and C are beneficiaries under a trust going into possession or enjoyment after X's death. E, F and G are donees of a gift *causa mortis*. The Government may compel F to pay the unpaid balance of $125,000 of the tax up to the full amount which F has received. F must pay. Then F may sue A, B and C and also E and G for their proportionate share of the $125,000 and get it if he can. If any one of them defaults F is the loser of the defaulter's share.

IV.

THE NATURE OF THE TRUST ESTATE WHICH IS INCLUDED IN THE "GROSS ESTATE."

Any estate is included which does not take effect in possession or enjoyment until at or after the donor's death. In Article 20 of the Regulations the Government seems to consider that a trust wherein the income goes to the same person who ultimately receives the principal is not within the definition; but that if the income goes to a third person the transfer is included. Thus if X, the donor, creates a trust, the income to go to A and the principal, upon the death of X, to Y, the trust estate is included in the "gross estaate." But if X creates a trust the income to go to Z until X's death and then the principal likewise to Z the trust estate is not included in the "gross estate." Probably under the law both would be included, but that is unimportant.

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(a) It is clearly immaterial under Section 402 (c) whether or not the donor reserves the income to himself during his lifetime. There may be no income. Or the income may be permitted to accumulate. Or it may be distributed as received to a third person; or (probably) to the beneficiary of the principal. The deed of trust may irrevocably cut off the donor from all control or benefit of both principal and interest. Yet the trust estate is included in the gross estate.

(b) Possession and enjoyment may vest at or *after* the death. A trust the principal to vest "twenty-five years after my death" is within the act.

(c) A trust "the income to my wife during her lifetime; upon *her* death, the income to my children for thirty years and thereafter the principal to my children" is not included in the gross estate.

Quaere: Would such trust estate be included if the donor were 60 or 75 years of age when the trust is made? Probably not. It is not a question of what is in "contemplation" of the donor. The sole question is wheher the *contingency* falls within the statute. The contingency must in every case be the death of the donor, not some other contingency, though it may be expected to occur after ~~its~~ death. If it were a question of "contemplation" then it would be a question of probability. The probability and contemplation would be that a trust would go into effect in possession and enjoyment after the donor's death if a man 75 years of age provided a trust the income to go to his wife, then 25 years of age, during her lifetime, thereafter the principal to the donor's children. Yet in that case clearly the trust estate would not be included in the "gross estate." The contingency of death, therefore, must be the determining element.

(d) A trust "the income to my son John during his lifetime, upon his death the principal to his children" is not included in the "gross estate." But a trust, "the income to my son John during his lifetime and upon his death, the principal to his children, such principal not to be delivered, however, until after my death" is included in the "gross estate."

(e) A trust by a man 75 years of age, the income to his wife for thirty years and then the principal to his child then five years of age, is not within the act.

V.

UPON WHAT THE TAX IS IN FACT LEVIED?

Assume an estate of $25,000, a tax of $150,000, with the additional liability of $125,000 upon the beneficiaries of the trust. (The figures are substantially in accord with the Austin case cited on page 1.)

In the supposititious case the executor has paid over to the Government the whole estate. Surely that cannot be an excise tax "on the right to transmit the estate, or its transmission." It would be a void tax because confiscatory. The donee has also paid $125,000. Surely this cannot be on "the right to transmit" the $25,000 estate. Nor can the $125,000 charge be an excise tax upon the beneficiaries' "right to receive"; for in that case why should the executor be required to pay the estate over to the Government for the beneficiaries' right to receive; and why should one donee or beneficiary be taxed for the right of another "to receive"? It cannot, therefore, be a tax upon the right to receive or the receiving.

Obviously two things are taxed: first, the exercise by the decedent of the right to transmit or the transmission; second, the exercise by the decedent in his lifetime be-

fore the enactment of the law of the right to transfer his property in trust, or the transfer. The same conclusion is arrived at by another illustration. X and Y die on the same date, each leaving an estate of $100,000. The Federal Estate Tax on the estate of X is $1,000. But Y having created a trust of $1,000,000 twenty-five years previously which comes under the act, his entire estate is taken in payment of the tax. Both transmit equal estates. The tax on one is $1,000, on the other $100,000. The additional $99,000 is a tax upon the transfer in trust.

Quaere: Assume that Y left no estate. Would a tax be assessable? The Government contended in *Levy* v. *Wardell*, 258 U. S. 542, that it would. If that contention is correct, then the mask is off. Even if we might have an estate tax of $100,000 on the right to transmit $1,000, we surely cannot have an estate tax of $100,000 on the right not to transmit anything at all. But if in such event no tax is assessable the case of the Government is equally bad. For as against the beneficiaries of the trust they are liable for $100,000 if the donor leaves an estate, however, small, while beneficiaries of an equal amount are free from tax if their donor leaves no estate at all. Moreover the classification with respect to beneficiaries is so interwoven with the entire scheme and plan of the act that if it falls, the act falls as a whole. Likewise the fatal defect in the classification of estates renders the tax void as to estates, and if it falls for that reason it falls as a whole, in so far as it is retroactive.

It is thus transmuted into a gift tax, each donee being liable for a tax the amount and percentum of which is determined by *other* gifts; the gift tax being retroactive and based on the classification discussed under Subdivision IV.

VI.

THE PURPOSE AND INTENT OF THE ACT.

It was the obvious intention of the act to obtain revenue by taxing transfers made before Congress began to tax successions or estates. It was intended to recoup for transfers which depleted estates. Obviously it was believed that Congress could still reach the undistributed portion of the property previously given away by parents to children and family. Probably also Congress intended that the tax should fall on the property which had been distributed. In Section F, which includes in the gross estate the proceeds of life insurance policies, a provision is made that the beneficiary of the policy should pay his pro rata share of the tax. The provision is crude and inadequate; but though the mechanics of the section are bad, the intent is reasonable. However, the framers entirely overlooked the fact that the same reasoning should apply to other persons who receive property from the decedent otherwise than through the executor. The failure to perceive this fact accounts for the unreasonableness of the classification for taxing purposes and the consequent appalling disparity.

As to trusts enacted or transfers made after the enactment of the law the court might possibly say as it did in *New York Trust Co.* v. *Eisner,* 256 U. S. 345, p. 349:

> "As to inequalities in case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes."

But such reasoning does not apply to irrevocable transfers made before the enactment of any estate or gift tax.

VII.

THE DISPARITY AS BETWEEN ESTATES.

Assume an estate of X, the decedent, worth net $25,000. During his lifetime X transferred $1,000,000, taking effect in possession and enjoyment upon contingencies other than his death. No Federal Estate Tax is assessable. Assume a like estate of Y, the decedent, with like net worth and like trusts, but the trusts to go into possession or enjoyment at or after his death. The estate is wipe dout, with liability over upon beneficiaries. Illustrating cases have been given under Heading IV above, indicating how irrelevant is the classification of estates with respect merely to the contingency of death. We wish now to refer to the unreasonableness of classification with respect to survivorship.

Assume also like estates and like trusts as above. But assume that X died before the enactment of the statute, Y after its enactment. The transfer by X is not taxable; the estate of Y is wiped out by the tax. Transfers made before the enactment are obviously being taxed, but only if the donor survives the enactment. Yet the beneficiaries of X may not have come into possession or enjoyment of the estate at the date of the enactment of the law.

Could Congress legally pass a law taxing by fixed or graduated tax all persons living at the time of the enactment,—or all persons who shall survive to a date, say one year after the enactment, upon any transfer in trust made by such survivors *at any time* prior to the enactment of the law. Obviously such a law might beggar kindly and benevolent people who had given away their fortunes, keeping only enough to supply the wants of advanced age. Even gifts to charities might be included, for their exclusion is but an act of Congressional grace.

If the tax were to apply only to the survivor, it would be a tax upon the man, not upon the transfer, the act. The act was the same by those surviving and those deceased. The mere fact that a tax upon certain designated acts performed before the enactment can be collected only from the living and from the solvent renders it discriminatory. A discriminatory tax law is not a law at all. The basic idea of law is that it operates uniformly. It would be, moreover, a direct tax for it would be applied on the mere contingency of a man being alive. It departs from the basic principle of excise tax which is that the tax is upon the act. Survivorship cannot be relevant to the tax. So also a retroactive tax—for example, upon all brokerage transactions made prior to the enactment but assessable only upon those who still remain in the brokerage business at the time of the enactment—would be unconstitutional because irrelevant to the classification of the act taxed.

Suppose further the percentum of the tax in the supposititious case were proportionate not to the value of the property transferred before the enactment, but to the value of the property transferred plus the net capital owned by the transferor on the date *when the statute was enacted*. Being made proportionate to his then capital would that not be a capital tax? It is a tax against the man in proportion, among other things, to his capital. It is a capital tax aggravated rather than ameliorated by other irrelevant circumstances. And, of course, a capital tax is a direct tax.

In what respect does Section 402 (c) differ from the foregoing supposititious case? In that it applies to estates. But the fiction that it is "the right to transmit" which is taxed is too flimsy for serious thought. The liability is upon the estate, but the tax is upon the transfer, and in percentum and amount will not in any two

conceivable cases bear the same ratio to the value of the estate.

And if a man may not be taxed, perhaps despoiled and beggared, by a tax during his lifetime upon a twenty-five year old transfer, may Congress deprive him in whole or in part of the right to employ his remaining means to provide for wife or child, for the helpless and dependent? Who among us will not say: "I will give up all possessions and live in penury sooner than be deprived of the means wherewith to secure my wife from want and to insure to my child an education and to protect her or him from beggary." Is not that the working principle of the life of every decent man?

Yet here we have a law which makes it impossible most of all for the generous and benevolent who have disposed of most of their fortune to ever accumulate enough to provide for surviving wife or child, or friend, or charity—possibly a wife or child of later years—except as to those to whom transfers have already been made. A man owning $1,000,000 and giving before the enactment of the statute $900,000 in trust for his children upon his death, and marrying again, retaining $100,000 for himself, cannot make provision for wife or after born child. That is not fancy. It is the Austin case, cited on page 1, the gender only being changed.

Can this classification of estates for taxing purposes be deemed to be within the rule of reason? And is not the mind of man appalled that under pretext of law, of uniform rule, these results should flow from ancient deeds, dependent upon the accidental and immaterial selection of contingencies wholly irrelevant to any conceivable tax purposes, often the haphazard suggestion of a lawyer or scrivener, for the temporary safe-guarding of gifts!

VIII.

THE DISPARITY BETWEEN BENEFICIARIES OF TRUSTS.

Illustrative case: X creates a trust estate which comes within the act, A and B, being the beneficiaries, C, the donee of a gift in contemplation of death. Y creates a similar estate, R and S being beneficiaries and T the donee of a similar gift. X and Y both die.

Example (a): X leaves an estate sufficient to pay the tax. Y spends or loses his fortune and leaves an estate insufficient to pay the tax. A, B and C are free from tax. R, S and T must pay.

Example (b): A has received an estate of $10,000, B $100,000, D a gift *causa mortis* for $200,000. The Government makes its levy on A, taking his entire estate. A seeks to sue B, C and D. B is in Europe. A recovers judgment against C and D, but D is insolvent. A loses the share payable by B and D.

Example (c): X has made an additional trust, the income to his wife for her lifetime, then the principal to A and B. Y has made an additional trust, the income to his wife for Y's lifetime, then the principal to R and S. The percentum of tax of A and B is in the lower brackets, this additional trust being omitted. The percentum of tax of R and S is in the higher brackets, the additional trust being included. And this is without regard to who actually did or probably would receive the principal of the trust at an earlier date, without regard to whether it was contemplated that the donor or the donor's wife would survive longer.

Illustrative case: X, seventy-five years of age, transfers a fund in trust, the income to be paid to A, his son, until B, his grandson becomes forty-five years of age, then the income to be paid to B. The grandson is five

years of age when the trust is made. Y makes an exactly similar trust, but with the provision that the principal should be paid to the grandson upon Y's death. The grandson of X is free from the tax. The grandson of Y is subject to the tax.

If any of the illustrative cases is subject to debate with respect to details, others can readily be selected which will not be subject to question. In any event the disparity as between beneficiaries is not due to any difference in the sum by which the estates of X and Y are depleted by gifts. It is due either, (a) to the difference of the named contingency in which the principal takes effect in possession or enjoyment, in the one case, the death of the donor, in the other case the death of another person or lapse of time, and utterly regardless of which contingency is further removed; or (b) the value of the donor's estate at the time of the subsequent date of his death dependent on the fluctuations of his fortune after the gift is made, his generosity, thrift or wastefulness; or (c) the value of similar trusts or gifts in contemplation of death for the benefit of others; or (d) the solvency of other beneficiaries or donees and their accessibility for purpose of suit.

It will be noted that the interest of a beneficiary in a trust may have been mortgaged or assigned, used up long before the tax law was enacted. Yet he remains liable for the tax. Even after the enactment of the tax law he can make no reserve to meet his liability because it cannot be calculated until the donor's estate is administered.

IX.

THE TRUE RULE RESPECTING CLASSIFICATION.

We have discussed the inequality and discrimination of the tax as between legatees, *cestui que trusts,* and donees, and the unreasonableness of the classification which the law creates.

Classification for the purpose of taxation must necessarily be a segregation of kinds and persons with reference to characteristics which are relevant to the purpose of taxation.

The difference in the characteristics between the kinds of trusts which are taxed and those free from tax, and the classes of persons taxed and those free from tax under Section 402c is utterly irrelevant. It constitutes, therefore, the taking of property without due process of law.

X.

THE FEDERAL ESTATE TAX IS A TAX UPON HEIRS AND LEGATEES AND IS A DIRECT TAX.

The executor stands in the shoes of the heirs and legatees with respect to the estate in excess of the indebtedness. If an excise tax attached to an act by the decedent during his lifetime it could be proved against his estate. But if it did not attach to the act, nor to the person by reason of the act, then it cannot be made a liability of the estate. As to the heirs and legatees it is a direct tax. It does not purport to be levied upon any act performed by them.

We have discussed the validity of a retroactive tax of this nature which might be assessable against a person surviving to a certain date, who at any time before

the enactment of the tax law had made transfers of a designated character; we have said that if such a law would be unconstitutional as to the transferor it would be unconstitutional as against his estate or executor. Section 402c, however, does not purport to tax the transferor. It requires a tax to be paid by the executor. The executor merely represents an interest, similar to a trustee. The executor is a fiction representing certain property rights and liabilities. As to property in excess of the decedent's liabilities the executor represents the legatees and heirs.

A tax against the decedent during his lifetime upon transfers made to him would be an excise tax. But a tax against his heirs and legatees, or any other person for transfers made by the decedent during his lifetime is a direct tax. It may be proportionate, with reference among other things, to the nature and size of certain transactions of the decedent, but as to the person paying the tax it is a direct tax. To put it in another way: The tax against the estate is a direct tax though levied with reference to transactions which might have been subject to an excise tax. There can be no valid advalorem excise tax against an estate, except as it is advalorem of the estate, or at most property transmitted *causa mortis* in connection with the transmission of the estate. It cannot be advalorem of other gifts, trusts, expenditures or transactions of the decedent, especially if these be prior to enactment. The tax may be computed with reference to other transactions, but as to the estate the tax is a direct tax. Not having been levied as a direct tax in proportion to population it is unconstitutional.

XI.

THE DOCTRINE THAT INCOME AND EXCISE TAXES MAY BE RETROACTIVE.

Section 402 (c) is levied as an excise tax. It is that if anything, but it is difficult to designate its character. The underlying hypothesis is that it is an estate tax. In fact, however, it taxes the succession if the estate is insufficient; but the succession is taxed with reference to the principal amount of the remaining estate and of the succession to others, and the tax itself is a tax upon transactions by the decedent which constituted a trust of a certain designated character. In so far as it is a tax liability of the estate, it is not proportionate to the estate; in so far as it is a tax liability of the successor, it is not proportionate to the succession, and in so far as it is a tax upon a transaction (a trust) it is not proportionate to the transaction. It is not astonishing that there are no precedents in point on the question of whether a tax of such a nature may be retroactive. It is readily conceivable that some kinds of income or excise taxes may be retroactive, while other kinds may not.

In a note appended to the report of *Schwab* v. *Doyle* in 26 A. L. R. p. 1461, is a collection of all state cases bearing on the constitutionality of retroactive succession taxes. It has reference to the constitutionality of a tax upon a succession after enactment under a deed of trust executed before enactment. The weight of opinion is that such an act is unconstitutional, but these cases all differ from the act in question in the following respects: (a) They treat of statutes which tax the succession only. (b) They are payable by the beneficiary of the trust, gift or transfer, not by anyone else. (c) The rate

is not based upon the value of the estate remaining at the time of the donor's decease, but upon the amount of donations or trusts established for beneficiaries. (d) The tax resulting from any one succession is not dependent upon anything save the value of the property with which that transaction is concerned. (e) The tax does not attach to the giving, but to the receiving, and no property is taxed except that which is received in possession and enjoyment after the enactment of the statute.

The case at bar therefore comes to this court without legal precedent, excepting the general doctrine that income and excise profit taxes may be retroactive, and this doctrine we will briefly discuss.

There are few, if any, legal doctrines which can be said to have no limitations, and which can endure forever unmodified. The doctrine that an income or excise tax law may be retroactive was established at a time when taxes were relatively small exactions by the Government: it was applied in a series of cases wherein it was comparatively innocuous, and led to no grevious wrong nor obvious confusion or discrimination. The doctrine is now facing the court in a situation altered in two respects.

First, in respect of magnitude. Taxes are no longer trivial; the Government is a substantial partner in every business enterprise and estate, often in individual transactions, of magnitude. All business is conducted with a view to Government exactions and interest as fixed by the Government itself in its Revenue Laws. By retroactive legislation the Government may render the wisest business transaction ruinous, innocent and even benevolent acts disastrous.

Second, in respect to time. In adjudicated cases respecting excise and income taxes in federal courts, re-

troactive tax laws are considered which apply to recent events and current accountings. In Section 402 (c) the Government has pressed the doctrine to its limit, the period of time is "at any time heretofore" and the obvious result in practice is confusion and discrimination from which the common sense of men recoils.

There must surely be limitations to the doctrine. Just as in the matter of amount, a tax must be reasonable (to the extent at least of not being confiscatory), so in the point of time a retroactive tax must be reasonable.

Assume the enactment in 1925 of laws: (a) Taxing all shipping carried during the world war. (b) Taxing automobile manufacturers 20 per cent upon all cars sold since 1914. (c) Taxing distillers 10 per cent on all spirits distilled since 1914. (d) Taxing real estate transfers since 1914. (e) Taxing all tobacco grown during the Spanish-American war.

These illustrations are no more extreme than a tax on an irrevocable trust made in 1903 (the Austin case). No more so than Section 402 (c) which renders prosperous estates insolvent, leaves penniless the natural objections of the bounty of deceased persons, and subjects the beneficiaries of quarter-century-old gifts to ruinous exactions, proportioned not even to the gifts received by them, and dependent upon the fluctuating fortunes of their benefactor. As a rule the very gift was made to secure the donee against those very fluctuations of the donor's fortune. Even in the matter of percentum, the illustrative cases are not extreme. An estate may be confiscated in its entirety; a donee may be taxed an amount equal to one hundred per cent of the gift received.

The question is, is the doctrine that a tax law may be retroactive, without limitations? If there be a limit, it is well within the wide and wild frontiers of Section 402 (c).

This court and other courts have upheld penal statutes on the ground that though it may be unreasonable to apply them in certain cases, yet they may be applied within the rule of reason. This position has been taken by the courts with reference to the penal statutes involving questions of negligence, and with reference also to unlawful combinations in restraint of trade, etc. Surely a legal doctrine though established, may likewise be upheld as sound with the limitation that it be applied within the rule of reason. So this doctrine that a tax law may be retroactive, may be upheld, but with a modification that it be reasonably applied. We would say that a retroactive tax law to be upheld must be reasonable in principle and obviously enforcible with uniformity in practice. Judged by any such standard, Section 402 (c) in so far as it purports to be retroactive, is to that extent unconstitutional, based upon entirely irrelevant classification, discriminative, and incapable of uniform enforcement, and therefore violative of the Fifth Amendment.

Isaac B. Lipson

Amicus Curiae.